

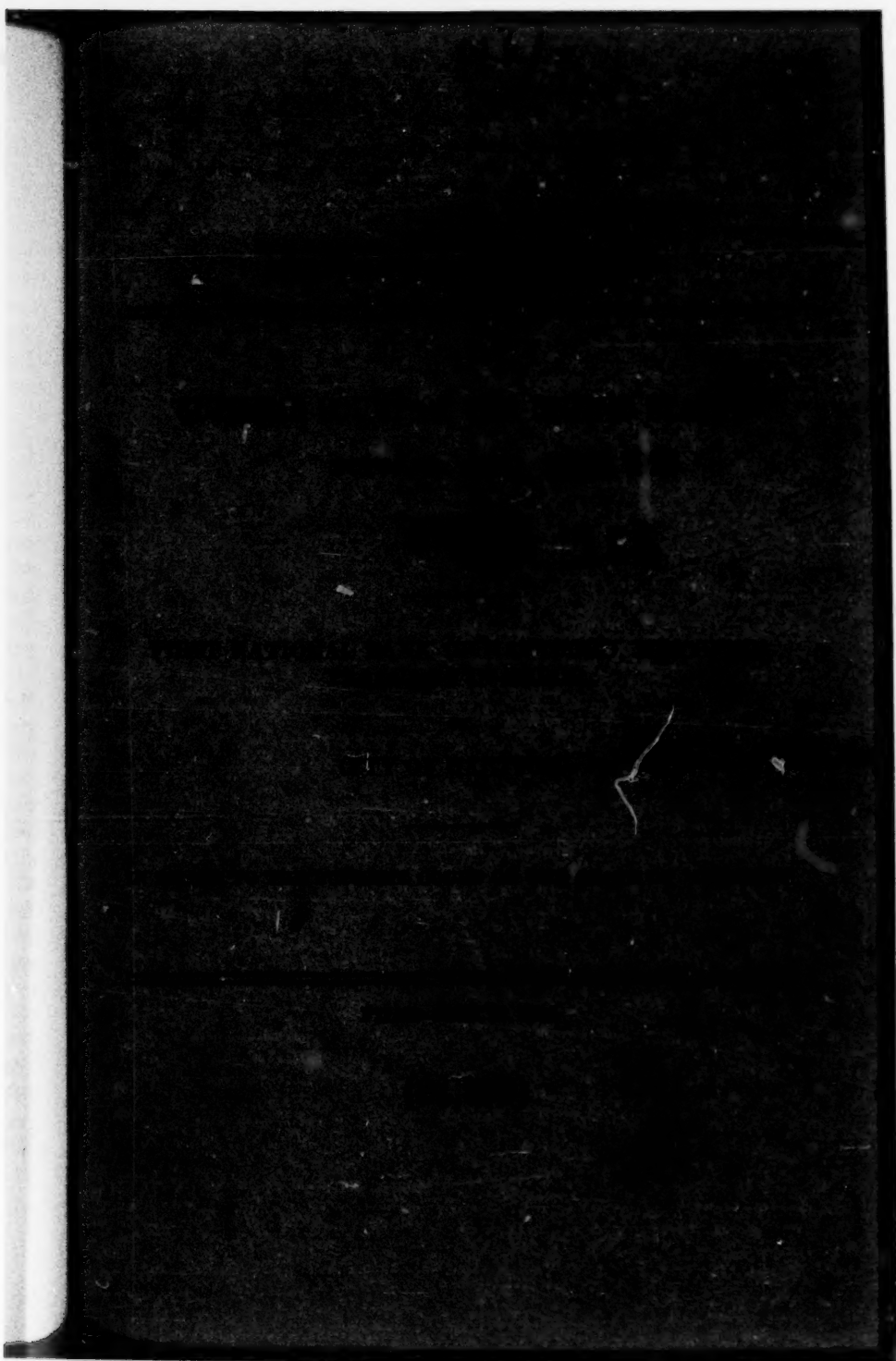


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 636

FIRST NATIONAL BANK OF HARTFORD, WISCONSIN,
PLAINTIFF IN ERROR,

vs.

CITY OF HARTFORD

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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[fol. 1] **IN SUPREME COURT OF WISCONSIN****WRIT OF ERROR AND RETURN—Filed July 1, 1925****UNITED STATES OF AMERICA, ss:**

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Wisconsin before you or some of you, being the highest court of law or equity of the said State of Wisconsin in which a decision could be had in the suit between First National Bank of Hartford, Wisconsin, and City of Hartford, wherein the State of Wisconsin was permitted to intervene, and wherein was drawn in question the validity of a statute of said State and also of an authority exercised under said State on the ground of their being repugnant to the Constitution and laws of the United States and the decision was in favor of their validity, and wherein rights, privileges and immunities were claimed under the Constitution and a statute of the United States and the decision was against a right, privilege and immunity specially set up and claimed under such Constitution and statute, a manifest error hath happened to the great damage of the said First National Bank of Hartford, as by its petition appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, D. C., within thirty (30) days from the date hereof, that the record and [fol. 2] proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States this 1st day of July in the year of our Lord One Thousand Nine Hundred and Twenty-five (1925).

H. C. Hale, Clerk of the District Court of the United States for the Western District of Wisconsin, by Fred W. French, Chief Deputy. (Seal of U. S. District Court, Western Dist. of Wisconsin, Madison.)

Allowed by me this 1st day of July, 1925.

A. J. Vinje, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal of Supreme Court of Wisconsin.)

STATE OF WISCONSIN,
Supreme Court, ss:

The return to the within writ appears by the schedule hereto annexed.

The return of the Justices of the Supreme Court of the State of Wisconsin.

Arthur A. McLeod, Clerk. (Seal of Supreme Court of Wisconsin.)

[fol. 3] [File endorsement omitted.]

[fol. 4] IN SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—Filed
July 1, 1925

To the Honorable Aad J. Vinje, Chief Justice of the Supreme Court of the State of Wisconsin, and to the other Justices of said Supreme Court:

The petition of First National Bank of Hartford, Wisconsin, plaintiff in error, respectfully represents as follows:

1. The plaintiff in error, the First National Bank of Hartford, Wisconsin, is and at all of the times hereinafter mentioned was a national banking association organized and existing under and by virtue of the National banking act, engaged in the banking business at the City of Hartford in the State of Wisconsin, with a paid-up capital stock of Fifty Thousand Dollars (\$50,000), consisting of five hundred (500) shares of the par value of One Hundred Dollars (\$100.) each, all owned by various shareholders of said bank.

2. The City of Hartford, one of the defendants in error, hereinafter referred to as "said City", is a municipal corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin and authorized to levy and collect taxes for city, county and state purposes.

3. The plaintiff in error, being a national banking association and an agency of the national government, is privileged and immune from all taxation by the state or any subdivision thereof or municipality therein, whether levied against its property or its shares of stock, except within the limits prescribed by and to the extent provided in Section 5219 of the Revised Statutes of the United States.

4. During the year 1921 the taxing officers of the said City in form assessed and levied a personal property tax for said year on all of [fol. 5] the shares of stock of the plaintiff in error at the then prevailing tax rate in the assessment district in which the bank of the plaintiff in error was located, to-wit: at the rate of \$3.177 on each

\$100 of the assessed valuation of said stock, which tax on the whole of said stock amounted to Two Thousand Eight Hundred Fifty-nine and 30/100 Dollars (\$2,859.30). Said taxes were entered upon the tax roll of said City for said year and in due time the tax roll for said year, with the taxes so in form assessed and levied against said shares of stock spread thereon and the warrant for the collection thereof, were placed in the hands of the City Treasurer of said City for the collection of said taxes.

5. Said taxes were assessed and levied under and pursuant to Sections 70.31, 70.37, 70.38, 70.39 and 70.40 of the Wisconsin Statutes for 1921, which provided specifically for the assessment and taxation of shares of stock in every bank or banking association, whether organized under the authority of any law of the State of Wisconsin or any act of the Congress of the United States, notwithstanding the fact that by Subdivision (10) of Section 70.11 of said statutes it was provided that all moneys or debts due or to become due to any person and all stocks and bonds (being all the moneyed capital within said state) other than shares of stock in banks and banking associations, should be wholly exempt from taxation. By reason of the fact that the statutes of said State thus provided for the taxation of shares of stock in national banks, while all moneyed capital within the State other than shares of stock in state and national banks was wholly exempted from taxation, said statutes, in so far as they provided for the taxation of shares of stock in national banking associations, were invalid on the ground of their being repugnant to the [fol. 6] Constitution of the United States and to Section 5219 of the Revised Statutes of the United States.

6. Acting under and pursuant to the Statutes aforesaid, the taxing officers of said City did not make any assessment against or levy any tax for said year upon any moneys or moneyed capital in the hands of any individual citizens of said City or against debts due or to become due to individual citizens or against any interest-bearing bonds or against any shares of stock in the hands of any of such citizens in any corporations except banking corporations, but suffered and permitted the same and the whole thereof to be and remain entirely free from assessment and exempt from taxation for said year. Notwithstanding such exemption there was during said year a very large amount of moneyed capital in the hands of individual citizens of said City running into many hundreds of thousands of dollars and entering into competition with the banking business, including the banking business of the plaintiff in error, that was neither assessed for taxation nor taxed, and there were vast amounts of moneyed capital in the hands of individual citizens of said State running into millions of dollars that entered into competition with the banking business, including the banking business of the plaintiff in error, which were neither assessed for taxation nor taxed. As a result thereof the shares of stock of the plaintiff in error, as well as the shares of stock of other national banking corporations doing business in said State, were taxed or attempted to be taxed at a much greater rate than other moneyed capital in

the hands of individual citizens of said City and State that entered into competition with the banking business, including the banking business of the plaintiff in error, and the taxation of said shares of [fol. 7] stock in said banks, including the plaintiff in error, and the total exemption of said amounts of moneyed capital in the hands of individual citizens entering into competition with the banking business resulted in an unjust, illegal and discriminating tax against the shares of stock in the plaintiff in error. By reason thereof said tax is invalid on the ground of its being repugnant to the Constitution and laws of the United States and there is denied to the plaintiff in error the privilege and immunity from taxation under the Constitution and Statute of the United States aforesaid.

7. On February 28, 1922, while said tax roll and warrant, with said taxes in form assessed against the shares of the plaintiff in error so spread thereon, were in the hands of the Treasury of said City for collection of taxes, the plaintiff in error, on behalf of its stockholders as well as in its own behalf and interest, and in the manner provided for under the statutes of said State, paid said taxes under protest to the City Treasurer of said City in the amount of Two Eight Hundred Fifty-nine and 30/100 Dollars (\$2,859.30). At the time the plaintiff in error so paid said taxes it accompanied the payment with and said City accepted the same under a written protest then lodged with said City, stating, among other things, that said taxes were unjust, discriminatory and illegally exacted in violation of the Constitution of the United States and of the Constitution of the State of Wisconsin, by compulsion and under duress and menace of and under threat of the imposition of illegal, unjust and oppressive penalties and the enforcement of an alleged lien on said stock, and further stating that the City Treasurer, to whom the check for said taxes was given, was authorized to cash the same only as an alternative to the resort to distress, the enforcement of [fol. 8] lien or other means provided by law for the enforcement of unpaid taxes, and that the plaintiff in error claimed the right of and would seek all available means for the recovery of such taxes.

8. Thereafter, and on February 21st, 1923, the plaintiff in error commenced an action against said City in the Circuit Court for Washington County, in said State of Wisconsin, in which said City is located, for the recovery of said taxes so unlawfully collected, as it had a right to do under the laws of the United States and under the laws of said State of Wisconsin.

9. Thereafter such proceedings were duly had that said action was brought on for trial in said Circuit Court for Washington County, upon which trial evidence was offered conclusively showing the existence during the year in question in said City and in the State of Wisconsin of moneyed capital as hereinbefore alleged, and thereupon the judge of said Circuit Court, upon the evidence sointroduced, made and filed his findings, wherein, among other things, he found the existence within said City and within said State during said year of moneyed capital so coming into competition with the business of national banks, including the plaintiff in error, as

hereinbefore alleged, and that said tax was illegal and void, and that the plaintiff in error was entitled to judgment for the recovery thereof. Thereupon, and on February 7, 1924, judgment was entered in said Circuit Court for Washington County in favor of the plaintiff in error and against said City for Three Thousand One Hundred Ninety and 84/100 Dollars (\$3,190.84) damages, together with costs in the sum of One Hundred Thirteen and 50/100 Dollars (\$113.50).

10. Thereafter said City, in the manner provided by the statutes of the State of Wisconsin, appealed from the judgment so entered [fol. 9] to the Supreme Court of said State. Thereafter the Attorney General of the State of Wisconsin by the direction of the Governor thereof and at the instance of the Tax Commission of Wisconsin and by leave of said Supreme Court intervened in said action in said Supreme Court on behalf of the State. Thereafter such proceedings were duly had in said Supreme Court that said cause was brought on for hearing and was heard on February 14, 1925 and was duly argued and submitted on the part of your petitioner and said City and said State, the defendants in error, and your petitioner duly urged that said judgment should be affirmed for the reason that the Wisconsin Statutes aforesaid were invalid in so far as they provided for the assessment and taxation of shares of stock in National banks and were in violation of and repugnant to the Constitution and laws of the United States, and that the tax so assessed and levied denied to the plaintiff in error and to its shareholders the privilege and immunity from taxation otherwise than under and pursuant to Section 5219 of the Revised Statutes of the United States to which they and it were entitled under the Constitution and laws of the United States.

11. On April 7, 1925 the Supreme Court of the State of Wisconsin rendered a decision, which decision under the laws of said State was subject to the right of the plaintiff in error to move for a rehearing, reversing said judgment, holding the said statutes of said State relating to the assessment and taxation of shares of stock in national banks to be valid and not in violation of the laws or Constitution of the United States and not a denial to the plaintiff in error or to its shareholders of the privilege and immunity hereinbefore mentioned, holding said tax valid and not in violation of the laws or Constitution of the United States and not a denial to [fol. 10] the plaintiff in error of the privilege and immunity aforesaid, and reversing the judgment of said Circuit Court and remanding said cause with directions to the trial court to enter judgment dismissing the complaint therein. Thereafter and on May 1, 1925 and within the time allowed therefor under the laws of said State of Wisconsin and the rules of said Supreme Court, the plaintiff in error duly filed a motion for rehearing and duly served and filed its argument in support thereof showing reasons why said decision was erroneous and of right ought to be reconsidered and reversed. Said motion for rehearing was duly submitted on arguments presented by the plaintiff in error and by the defendants in error in

the manner provided by the laws of said State. Thereafter such proceedings were had in said cause under and pursuant to the laws of said State and the rules of said Supreme Court of said State that on June 22, 1925 a final decision was rendered in said cause in said Supreme Court denying said motion for rehearing and affirming the decision theretofore rendered, reversing said judgment and directing said trial court to enter judgment dismissing the complaint of the plaintiff in error.

12. The Supreme Court of the State of Wisconsin is the highest court of the State of Wisconsin in which a decision in this cause can be had.

13. In and by said final decision manifest errors were committed to the great damage of your petitioner because there was drawn in question the validity of a statute of the State of Wisconsin and the validity of an authority exercised under said State on the ground of their being repugnant to the Constitution and laws of the United States and the decision was in favor of their validity, and because rights, privileges and immunities were in said suit set up and claimed [fol. 11] by your petitioner in its own behalf and in behalf of its shareholders under the Constitution of the United States and the decision was against the rights, privileges and immunities so set up and claimed by your petitioner under said Constitution, all of which will more particularly appear from the assignments of errors which is filed with this petition as aforesaid.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue and be allowed to the Supreme Court of the State of Wisconsin and the judges thereof, and that the errors in said decision, finding, determination and judgment may be duly corrected and full and speedy justice done to the parties aforesaid in its behalf, and that a transcript of the records, proceedings and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States, that citation be granted and signed, that the bond herewith presented be approved, and that upon compliance with the terms of the statutes in such case made and provided such bond and writ of error may operate as a supersedeas.

Dated this 30th day of June, 1925.

Geo. P. Miller, Edwin S. Mack, Arthur W. Fairchild, Gilbert Hardgrove, E. W. Sawyer, Attorneys for the First National Bank of Hartford, Wisconsin, Plaintiff in Error.
E. W. Sawyer, Edward J. Gehl, of Counsel.

[fol. 12] The writ of error as prayed for in the foregoing petition is hereby allowed this 1st day of July, 1925, to operate as a supersedeas with bond in the sum of One Thousand Dollars (\$1,000) conditioned as the law directs.

A. J. Vinje, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal of Supreme Court of Wisconsin.)

[fol. 13] [File endorsement omitted.]

[fol. 14] IN SUPREME COURT OF WISCONSIN

FIRST NATIONAL BANK OF HARTFORD, WISCONSIN, Plaintiff in Error,

vs.

CITY OF HARTFORD and STATE OF WISCONSIN, Defendants in Error

In Error to the Supreme Court of the State of Wisconsin

ORDER ALLOWING WRIT OF ERROR—Filed July 1, 1925

This 1st day of July, 1925, First National Bank of Hartford, Wisconsin, filed herein and presented to me its petition praying that a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Wisconsin may be allowed to bring up for review before the Supreme Court of the United States the final judgment of the Supreme Court of the State of Wisconsin in that certain cause therein mentioned and that a citation issue and the amount of the supersedeas bond be fixed, that a transcript of the record, proceedings and papers in the cause, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof, it is ordered that a writ of error herein be and is hereby allowed and that said First National Bank of Hartford, Wisconsin, give bond according to law in the sum of One Thousand Dollars (\$1,000), which bond, when approved, shall act as a supersedeas.

Witness the Honorable Aad J. Vinje, Chief Justice of the Supreme Court of the State of Wisconsin, this 1st day of July, 1925.

A. J. Vinje, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal of Supreme Court of Wisconsin.)

[fol. 15] [File endorsement omitted.]

[fol. 16] IN SUPREME COURT OF WISCONSIN

[Title omitted]

In Error to the Supreme Court of the State of Wisconsin

ASSIGNMENTS OF ERROR AND PRAYER FOR REVERSAL—Filed July 1, 1925

Now comes the above named plaintiff in error, by George P. Miller, Edwin S. Mack, Arthur W. Fairchild and J. Gilbert Hardgrove, its attorneys, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of

Wisconsin in the above entitled cause there are manifest errors upon which it will rely in and for its prosecution of the writ of error in the above entitled cause, to-wit:

1. The Supreme Court of the State of Wisconsin erred in holding that Sections 70.31, 70.37, 70.38, 70.39 and 70.40 of the Wisconsin Statutes in force in 1921, in so far as the same provided for the assessment and taxation of shares of stock in national banking associations notwithstanding the fact that by Subdivision (10) of Section 70.11 of said Statutes it was provided that all other moneyed capital should be exempted from taxation, were valid laws and within the consent conferred by Section 5219 of the Revised Statutes of the United States, and in refusing to hold that the same were invalid on the ground of their being repugnant to the Constitution of the United States and to Section 5219 of the Revised Statutes of the United States.

[fol. 17] 2. The said Supreme Court erred in refusing to hold that said Statutes were invalid in so far as they provided for the assessment and taxation of shares of stock in national banking associations, on the ground that they operated to deprive the plaintiff in error and its shareholders of the right and privilege of immunity from state taxation otherwise than in the manner and to the extent permitted by Section 5219 of the Revised Statutes of the United States to which, as an agency of the National Government, it was entitled.

3. The said Supreme Court erred in holding the tax assessed and levied against the shares of stock in the plaintiff in error to be a legal tax, and in refusing to hold that said tax was illegal and void on the ground of its being repugnant to the Constitution of the United States and to Section 5219 of the Revised Statutes of the United States.

4. The said Supreme Court erred in refusing to hold that said tax was illegal and void on the ground that it operated to deprive the plaintiff in error and its shareholders of the right and privilege of immunity from taxation by the state otherwise than in the manner and to the extent permitted by Section 5219 of the Revised Statutes of the United States to which, as an agency of the National Government, it was entitled.

5. The said Supreme Court erred in holding it to be a matter of common knowledge that there was no moneyed capital within said state or within said city during said year coming into competition with the business of national banks, notwithstanding the undisputed evidence and the findings of the trial court amply sustained thereby to the contrary.

6. The said Supreme Court erred in reversing the decision of the [fol. 18] Circuit Court for Washington County in the State of Wisconsin, and directing the entry of judgment dismissing the complaint of the plaintiff in error for the recovery of the taxes so illegally assessed, levied and collected from it.

For such errors the plaintiff in error prays that the final judgment and decision of the Supreme Court of the State of Wisconsin made and entered on the 22nd day of June, 1925 be reversed by the Supreme Court of the United States, with directions to affirm the judgment entered in the Circuit Court for Washington County in the State of Wisconsin on the 7th day of February, 1924, all because of errors hereinbefore assigned, and that said plaintiff in error be restored to all things that it has lost by reason thereof.

Dated this 30th day of June, 1925.

E. W. Sawyer, Geo. P. Miller, Edwin S. Mack, Arthur W. Fairchild, J. Gilbert Hardgrove, Attorneys for the First National Bank of Hartford, Wisconsin, Plaintiff in Error.
E. W. Sawyer, Edward J. Gehl, of Counsel.

The foregoing assignment of errors was duly presented to me this 1st day of July, 1925, before allowing the writ of error in such case of even date.

A. J. Vinje, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal of Supreme Court of Wisconsin.)

[fol. 19] [File endorsement omitted.]

[fols. 20-25] CITATION—In usual form, showing service on Herman L. Ekern et al.; filed July 7, 1925; omitted in printing

[fols. 26-30] BOND ON WRIT OF ERROR FOR \$1,000—Approved and filed July 1, 1925; omitted in printing

[fols. 31-33] IN SUPREME COURT OF WISCONSIN

CAPTION

Be it remembered that heretofore, to-wit: on the twelfth day of July in the year of our Lord One Thousand Nine Hundred and Twenty-four came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the City of Hartford, by its attorney and filed in said Court its certain Notice of Appeal, according to the statute in such case made and provided, and also the Return to such appeal of the Clerk of the Circuit Court of Washington County, in said State, in words and figures following, that is to say:

[fol. 34]

[File endorsement omitted]

IN CIRCUIT COURT OF WASHINGTON COUNTY

FIRST NATIONAL BANK, Plaintiff,

vs.

CITY OF HARTFORD, Defendant

SUMMONS—Filed in Circuit Court Nov. 6, 1924; in Supreme Court
July 12, 1924

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons upon you, exclusive of the day of service, and defend the above entitled action in the court aforesaid, and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint, of which a copy is herewith served upon you.

Yours, etc., E. W. Sawyer, Plaintiff's Attorney.

P. O. Address: Hartford, Washington County, Wis.

[fol. 35]

[File endorsement omitted]

IN CIRCUIT COURT OF WASHINGTON COUNTY

[Title omitted]

BILL OF COMPLAINT—Filed in Supreme Court July 12, 1924

The above named plaintiff, appearing by E. W. Sawyer, its attorney, for a cause of action against the defendant alleges:

I

That the plaintiff is a national banking corporation, organized under the laws of the United States, and at all times hereinafter stated, was engaged in the banking business at Hartford, Wisconsin, with a paid up capital stock of (\$50,000.00) Fifty Thousand Dollars, divided into five hundred shares of the par value of One Hundred (\$100.00) Dollars each, which shares were owned by various stockholders of said bank.

II

That the defendant is a municipal corporation of this state, to wit: a city of the fourth class, operating under the general charter law of this state.

III

That Section 5219 of the Revised Statutes of the United States, relating to the right and authority of states and their governmental agencies to tax shares of stock in national banking corporations located therein, expressly provides that such taxation should not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, which statute and provision were in force at the times hereinafter stated.

[fol. 36]

IV

That Sections 1051 and 1057a of the Wisconsin Statutes in force at the times hereinafter stated, provided that the shares of stock of every bank or banking association within this state, including national banks, should be assessed and tax as personal property in the assessment district where such bank is located, and the taxes levied thereon should be a lien on such shares, and should be subject to levy and sale for the payment of such tax. That Section 1038 of the Wisconsin Statutes in force at the times hereinafter stated, expressly exempted from taxation all moneys, all debts due or to become due to any person, and all bonds and stocks, except the shares of bank stock as above provided.

V

That during the year 1921, the taxing officers of the defendant city of Hartford, pursuant to the requirement of the Wisconsin Statutes above referred to, in form assessed and levied a personal property tax for such year upon the said shares of stock of the plaintiff bank, at the then prevailing tax rate in the assessment district in said city in which said bank was located, to wit; at the rate of \$3.177 on each One Hundred (\$100.00) Dollars of the assessed valuation thereof, which said tax, on the total number of shares of stock of said bank, amounted in the aggregate to the sum of Twenty Eight Hundred Fifty Nine and 30/100 (\$2,859.30) Dollars. That said taxes were entered upon the tax roll of the defendant city for said year, and in due time placed in the hands of the City Treasurer for collection.

That said taxing officers of said defendant city, in accordance with the said provisions of said Section 1038, did not assess or levy any tax for such year against any moneys, debts due or to become due or against any bonds or other shares of stock of any other person or persons in said city, but suffered and permitted the same to remain exempt from taxation as by said Section 1038 provided. That in consequence thereof, the said shares of stock of said plaintiff were [fol. 37] so taxed or attempted to be taxed at a greater rate than other moneyed capital in the hands of other individuals in said city, contrary to and in violation of the restriction so imposed by said Section 5219 of the Revised Statutes of the United States, whereby said tax so in form assessed and levied against said shares of stock in said plaintiff bank was illegal, unauthorized and void, and said taxing

officers were wholly without power or authority to so levy or collect the same.

VI

That on February 28, 1922, and while said tax roll of said city, with such taxes in form against shares of stock of said plaintiff bank, were so spread thereon, was in the hands of said City Treasurer of said city for collection, the said plaintiff, pursuant to the right given it by Section 1057b of the Wisconsin Statutes, paid said tax under protest to the City Treasurer of said City of Hartford, the amount paid being the said sum of Twenty Eight Hundred Fifty-Nine and 30/100 (\$2,859.30) Dollars.

VII

That on January 27, 1923, the plaintiff duly made and filed its claim in writing, which was duly sworn to, against said defendant city, for a refund and repayment of the amount of such illegal and unauthorized tax so paid by it under protest to said city, to wit: for said sum of Twenty Eight Hundred Fifty Nine and 30/100 (\$2859.30) Dollars, and interest from February 28, 1922, a copy of which claim is annexed hereto, and made a part hereof. That said defendant city has failed to allow such claim.

That this action is brought within one year after the payment by plaintiff of such illegal tax under protest as aforesaid.

Wherefore, the plaintiff demands judgment against the defendant for the sum of Twenty Eight Hundred Fifty Nine and 30/100 (\$2,859.30) Dollars, and interest from February 28, 1922, together with its costs of this action.

E. W. Sawyer, Plaintiff's Attorney.

[fol. 38] *Duly sworn to by John G. Liver. Jurat omitted in printing.*

[fols. 39-41] To the City of Hartford, Washington County, Wisconsin, and to the Common Council thereof:

The undersigned First National Bank of Hartford, Wisconsin, a national banking corporation, in behalf of itself, and its stockholders, being aggrieved by the levy and collection by said City of Hartford and its officers, of an unlawful tax assessed for the year 1921, against the shares of stock of said First National Bank, in the name of the several owners thereof, in the sum of Twenty eight Hundred Fifty Nine and 30/100 (\$2,859.30) Dollars, which said unlawful tax was, on February 28, 1922, paid under protest to the City Treasurer of said City, by said First National Bank, in accordance with the statutes of this state, in such cases made and provided, hereby claims and presents its claim against said city, for a refund to said bank of the amount of such illegal tax, namely for the sum of Twenty eight Hundred Fifty Nine and 30/100

(\$2,859.30) Dollars, and interest thereon from February 28, 1922, for the reason that the levy, imposition and collection of said tax was wholly unauthorized and void, in that said shares of stock in said bank were assessed and taxed by said taxing officers of such city at a greater rate than other moneyed capital in the hands of individual citizens of this state, and of the city of Hartford, Wisconsin, and vicinity were assessed and taxed, contrary to the provision of Section 5219 of the Revised Statutes of the United States; that the Supreme Court of the United States has held such a tax to be illegal and void, as claimaint is informed and believes.

Dated January 22, 1923.

First National Bank, by John G. Liver, President.

Duly sworn to by John G. Liver. Jurat omitted in printing.

[fol. 42]

[File endorsement omitted]

IN CIRCUIT COURT OF WASHINGTON COUNTY

[Title omitted]

ANSWER—Filed in Circuit Court Nov. 6, 1923; in Supreme Court July 12, 1924

And now comes the above named defendant, City of Hartford, by J. C. Russell, city attorney, and for answer to the complaint of the plaintiff herein, admits, alleges and denies as follows:

1. It admits the allegations contained in paragraphs one, two and three of said complaint.

2. This defendant further answering alleges that the plaintiff is a National banking corporation and for many years last past, and now is, engaged in the banking business and during said time owned the premises upon which its bank building is situated within the taxing district of the defendant city of Hartford.

3. That Section 5219 of the Revised Statutes of the United States relative to the power of each state to assess and tax shares of stock of National banking associations provides that nothing therein shall prevent all of the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by the authority of the State within which the association is located and that the legislature of each State may determine and direct the manner and place of taxing all the shares of National Banking Associations.

4. That Section 1051 and 1057 of the Revised Statutes of Wisconsin provides that all the shares of stock of every bank or banking

association, whether organized under the authority of any law of this State or any of the Acts of Congress of the United States, shall be [fol. 43] assessed and taxed in the assessment district in which such bank is located for the transaction of business, and shall be liable to assessment and taxation as personal property, shall be entered on the assessment roll in the name of the several owners separately from the assessment or other personal property assessable to such owners, and that the valuation of such shares of stock and the taxes thereon shall be separately entered in the tax roll and that the taxes levied thereon should be a lien on such shares and should be subject to the levy and sale for the payment of such tax.

5. That the shares of stock of said plaintiff for many years last past have been, and now are, upon the assessment and tax rolls of said defendant, City of Hartford, in the names of the several owners separately from the assessment of other personal property assessable to such owners.

6. This defendant further answering alleges that the Hartford High School, a separate taxing unit, comprising of the entire city of Hartford, in the year of 1921, for the maintaining of said High School, levied a tax in the sum of \$23,578.00 upon all the taxable property in the city of Hartford, of which the shares of stock described in the complaint were a part and portion thereof; that joint school District No. 4, a separate taxing unit, consisting of the First and Fourth Wards of the city of Hartford and part of the town of Hartford, in the year of 1921 for the purposes of maintaining said District school levied a tax in the sum of \$7,238.00 against all of the taxable property in the First and Fourth Wards of the city of Hartford and which said shares of stock were a part and portion thereof; that the county tax paid by said city of Hartford for the year of 1921 amounted to the sum of \$25,268.51 and that the state tax paid by the city of Hartford for said year amounted to the sum of \$9,539.39; that before any tax was levied by the taxing officers of the city of Hartford, said High School tax, the tax for said joint School District [fol. 44] No. 4, the county and state taxes were levied upon the city and ward property as above set forth.

7. That as defendant is informed and believes, all the officers of said First National Bank and a great number of its stockholders were present at the annual meeting of said High School which levied the tax as aforesaid, acquiesced in and voted for the levying of said tax; that said officers and stockholders were also present at said School District meeting, acquiesced in and voted to levy the tax aforesaid against the taxable property of the First and Fourth Wards of said city of Hartford, which included the shares of stock described in the complaint as aforesaid.

8. That during the year of 1921, the taxing officers of the city of Hartford, pursuant to the requirements of the Wisconsin Statutes, assessed and levied a tax at the rate of \$3.177 on each One Hundred Dollars on all taxable property in the First and Fourth Wards in the city of Hartford; that the shares of stock of said First National

Bank were included in said taxable property and that the tax levied against said shares of stock amounted to the sum of \$2,859.30; that said tax was *entered upon the tax roll for the defendant city for said year of 1921 and in due time placed in the hands of the city treasurer for collection.*

9. That before the first day of June, 1921, John G. Liver, President of the plaintiff bank, made out and delivered to the assessor a statement showing the number and par value of the shares of stock of the plaintiff, the name and residence of each stockholder therein on the preceding first day of May, and the amount of stock owned and held by him on that day;

10. The defendant further alleges that the plaintiff had notice and full knowledge that the assessment was made against each of the owners of said capital stock for the year of 1921, as required by the Wisconsin Statute, and that notwithstanding said notice and knowledge, the plaintiff, at no time objected to the assessment, but acquiesced therein until the 28th day of February, 1922, when complaint was first made to the city treasurer because of said assessment.

11. Defendant further alleges that the Board of Review of the city of Hartford met in the Common Council chambers, in the City Hall, in the city of Hartford, on the 5th day of July, 1921, and continued in session until the 12th day of July, 1921, inclusive, when its business was completed; that due notice, as required by Statute, of the time and place of said meeting was given, by the posting of the notices required by law and also in addition to the posting of said notices, by publishing notice thereof at least ten days prior to the meeting of said Board in the official paper of the city of Hartford, a copy of said notice is hereto attached, made a part hereof and marked Exhibit "A"; that notwithstanding the meeting of said Board and the notice thereof, the plaintiff did not, either in person or by agent, present any objections before said Board to the assessment made against said shares of stock, nor did it present any evidence to such Board to show that said assessment was improper.

12. Defendant further alleges that the defendant did assess and levy a tax for the year 1921 against the stock of Hartford Exchange Bank and First City Bank, State banking institutions doing business within the taxing unit of the defendant City, and entered the same upon the assessment and tax rolls of said defendant City as personal property as provided by Statute.

13. It admits that on the 28th day of February and while said taxes were on the tax roll for the city of Hartford against the shares of stock assessed against the different individual owners of said stock, the plaintiff paid said tax under protest to the city treasurer of the city of Hartford and the amount so paid being the sum of Twenty Eight Hundred Fifty-nine and 30/100 Dollars.

[fol. 46] 14. It admits that on the 27th day of January, 1923, the plaintiff filed its claim in writing, which was duly sworn to,

against said defendant city for the amount of the tax so paid by it under protest and interest on same from the 28th day of February, 1922, and that a copy of said claim is annexed to the complaint, made a part thereof and that said city failed to allow said claim before the commencement of this action and that the action was brought within one year after the payment by the plaintiff of said tax under protest as aforesaid.

15. This defendant further answering denies each and every allegation of said complaint not herein expressly admitted, qualified or explained.

Wherefore, defendant demands that the complaint be dismissed with costs.

J. C. Russell, City Attorney, Attorney for Defendant.

Duly sworn to by J. H. G. Lieven. Jurat omitted in printing.

[fols. 47 & 48]

EXHIBIT "A."

Notice

Monday, July 4th, being a holiday the Board of Review of the city of Hartford will be in session in the city hall on Tuesday, July 5th, at 9 o'clock a. m. for the purpose of reviewing the assessment roll and hear all objections that may be presented and make such corrections as they in their judgment see proper.

Dated June 23rd, 1921.

Wm. Radke, City Clerk.

[fol. 49] IN CIRCUIT COURT OF WASHINGTON COUNTY

[Title omitted]

MINUTE ENTRY OF JUDGMENT

This action coming on before the Court, a jury having been waived, and after hearing arguments of counsel and after due consideration the Court is of the opinion and so decides that the tax imposed by the Defendant against the Plaintiff was and is illegal and void from its inception.

That Statute Sec. 70.47, Subsec. 6 does not apply and that the Plaintiff is entitled to judgment as demanded in its complaint.

By the Court.

C. M. Davison, Circuit Judge.

[fol. 50]

[File endorsements omitted]

IN CIRCUIT COURT OF WASHINGTON COUNTY

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed in Circuit Court Feb. 6, 1924; in Supreme Court July 12, 1924

The above cause being upon the calendar for the October, 1923 term of said court for trial, and the plaintiff upon the call of the calendar having duly moved the court to transfer said cause to the court calendar for trial by the court without a jury, and the parties thereupon consenting in open court to the trial thereof by the court without a jury, and said cause having been duly tried to the court and submitted, E. W. Sawyer as attorney, and Miller, Mack and Fairchild as counsel, appearing for the plaintiff, and J. C. Russell, Esq. appearing for the defendant, and after listening to the evidence, arguments of the counsel for the respective parties, and having duly considered said matter, the court hereby makes and finds the following Findings of Fact and Conclusions of Law, to-wit:

Findings of Fact

I

That the plaintiff is, and at the times herein stated was, a National banking corporation engaged in the banking business at Hartford, Wisconsin, with a paid up capital stock of Fifty Thousand Dollars (\$50,000) consisting of five hundred (500) shares of the par value of One Hundred Dollars (\$100) each, all owned by various stockholders of said Bank.

II

That the defendant is a city of the fourth class, operating under [fol. 51] the general charter law of this state.

III

That during the year 1921 the taxing officers of the defendant city of Hartford, in form assessed and levied a personal property tax for such year on all of the said shares of stock of the plaintiff bank, at the then prevailing tax rate in the assessment district in which the said bank is located, to-wit, at the rate of Three and One Hundred Seventy-seven thousands Dollars (\$3.177) on each One Hundred Dollars (\$100) of the assessed valuation of such stock, which tax on the whole of said stock amounted to Two Thousand Eight Hundred Fifty-Nine and 30/100 Dollars (\$2,859.30). That such taxes were entered upon the tax roll of the defendant city for said year and in due time the tax roll for said year with the taxes

so in form against said shares of stock, spread thereon, and the warrant for the collection thereof, were placed in the hands of the city treasurer of said city for the collection of said taxes.

IV

That said taxing officers of said defendant city did not make any assessment against, or levy any tax for said year, 1921, upon any moneys or moneyed capital in the hands of any individual citizens of said city or against any debts due or to become due to such individual citizens or against any interest bearing bonds or against any shares of stock in the hands of any of such citizens, in any corporations except banking corporations, but suffered and permitted the same and the whole thereof to be and remain entirely free from assessment, and exempt from taxation for said year, in accordance with the provisions of sub-section 10 of section 70.11 of the Wisconsin statutes.

V

That during the year 1921 there was a very large amount of [fol. 52] moneyed capital in the hands of individual citizens of said city of Hartford, running into many hundreds of thousands of dollars, that was neither assessed for taxation nor taxed, which entered into competition with the banking business, including the banking business of the plaintiff.

That during said year, 1921, there were vast amounts of moneyed capital in the hands of individual citizens of this state, running into millions of dollars that entered into competition with the banking business, that under the provisions of said section 70.11 sub-section 10, were wholly exempted from taxation.

That as a result thereof, the shares of stock of said plaintiff bank as well as the shares of stock of other national banking corporations doing business in this state, were taxed or attempted to be taxed at a much greater rate than other moneyed capital in the hands of individual citizens of said city and state, that entered into competition with the banking business, including the banking business of the plaintiff; and the taxation of said shares of stock in said banks, including the plaintiff bank, and the exemption of said amounts of moneyed capital in the hands of individual citizens entering into competition with the banking business, resulted in an unjust, illegal and discriminating tax against said bank's shares.

VI

That on February 28, 1922, and while said tax roll and warrant with said taxes in form against the shares of said plaintiff bank so spread thereon, were in the hands of the treasurer of said city for collection of taxes, the said plaintiff in behalf of its stockholders, as well as in its own behalf and interest, paid said tax under protest to the city treasurer of said city, in the sum of Two Thousand Eight

Hundred Fifty-nine and 30/100 Dollars (\$2,859.30). That at the time plaintiff so paid said tax it accompanied the payment with [fol. 53] and said city accepted the same, under a written protest then lodged with said city, stating among other things, that said taxes were unjust, discriminatory and illegally exacted in violation of the federal and state constitutions under menace of compulsion and unjust and oppressive penalties, and further stating that the city treasurer to whom the check for such taxes was given, was authorized to cash the same, only, as an alternative to the resort to distress or other means provided by law for the enforcement of unpaid taxes; that said bank claimed the right and would seek all available means for the recovery of such taxes.

VII

That on January 27, 1923, the plaintiff in behalf of itself and its said stockholders, filed with the city clerk of said city, its verified claim in writing against said city for the refund and repayment of the amount of said taxes and interest, a copy of which claim is annexed to the complaint herein.

That on the 16th day of February, 1923, the Common Council of said defendant city, upon consideration of said claim, affirmatively disallowed the same.

Conclusions of Law

I

The tax so in form levied and assessed against said shares of stock was unauthorized, illegal and void in its inception, and in violation of, and repugnant to, the provisions of section 5219 of the Statutes of the United States pertaining thereto; and the taxing officers of the defendant city were without power or authority to assess the said shares for taxation or to levy any tax against the same.

[fols. 54-71]

II

That subsection 6 of section 70.47 of the Wisconsin Statutes does not apply to this case. That the payment by plaintiff of said taxes to said city was not a voluntary payment but under such protest as was sufficient to entitle and permit the plaintiff to recover the same herein.

The plaintiff is entitled to judgment against the defendant as demanded in the complaint.

Let judgment be entered accordingly.

Dated February 2nd, A. D. 1924.

By the Court:

C. M. Davison, Circuit Judge.

[fols. 72 & 73] [File endorsements omitted]

IN CIRCUIT COURT OF WASHINGTON COUNTY

[Title omitted]

JUDGMENT—Filed in Circuit Court Feb. 6, 1924; in Supreme Court July 12, 1924

The above cause being on the calendar for the October, 1923 term of said court, came duly on for trial by the court without a jury, said cause upon plaintiff's motion and the consent of the defendant thereto in open court, having been duly transferred to the court calendar for trial by the court without a jury, and said cause having been duly tried to the court and submitted, E. W. Sawyer as attorney, and Miller, Mack & Fairchild as counsel, appearing for the plaintiff, and J. C. Russel, Esq., appearing for the defendant; and the court, after hearing the evidence and arguments of counsel for the respective parties, having duly made and filed its Findings of fact and Conclusions of Law herein, and ordered judgment to be entered in favor of the plaintiff and against the defendant City of Hartford, as demanded in the complaint:

Now, therefore, on motion of plaintiff's attorneys, it is hereby Ordered, Adjudged and Determined that the plaintiff First National Bank of Hartford, Wisconsin, do have and recover of the defendant City of Hartford, the sum of Three Thousand One Hundred Ninety and 84/100 Dollars (\$3,190.84) damages, together with its costs and disbursements of this action taxed at the sum of One Hundred Thirteen and 50/100 Dollars.

Dated February 7, 1924.

By the Court:

John H. Klessig, Clerk.

[fols. 74 & 75] [File endorsements omitted]

[fol. 76] IN CIRCUIT COURT OF WASHINGTON COUNTY

[Title omitted]

Bill of Exceptions—Filed in Circuit Court July 7, 1924; in Supreme Court July 12, 1924

APPEARANCES OF COUNSEL

Case called for trial this 6th day of November, 1923.

Appearing: Plaintiff by E. W. Sawyer, its attorney, and Miller, Mack & Fairchild as counsel. Appearing, The defendant, City of Hartford, by John C. Russell, its attorney.

Case tried before the Hon. C. M. Davison, Circuit Judge, without a jury as follows:

Examination by Mr. E. W. Sawyer:

I call Mr. JACOB HAHN, an officer of the city of Hartford, for examination under the provisions of Section 4068 of the Statutes. Mr. Jacob Hahn sworn.

Mr. John C. Russell: 1. I object to the introduction of any evidence under the complaint for the reason that the Court has no jurisdiction of the subject matter of the action. 2. Because the complaint does not state facts sufficient to constitute a cause of action.

Court: Demurrer on both grounds overruled for the present.

[fol. 77] Q. Where do you live?

A. City of Hartford.

Q. Did you live there in 1921?

A. Yes.

Q. Were you an officer of the city of Hartford in 1921?

A. City Assessor.

Q. Have you in your possession the assessment book of the real and personal property assessed in the city of Hartford for the year 1921?

A. Yes.

Q. Will you produce that book?

Marked "Plaintiff's Exhibit No. 1."

Q. I show you Plaintiff's Exhibit No. 1 and ask you if that is such book?

A. Yes.

Q. Does that book contain the assessment made against the shares of stock in the First National Bank, City of Hartford, for the year 1921?

A. Yes.

Q. Will you turn to the pages where that assessment appears?

Q. Does that assessment appear upon one page or on several pages of this book?

A. I think on two pages. The right hand page and the back of it. Page 187.

Q. Is the left hand page opposite that marked as a page?

A. No.

Q. I ask for the purpose of identification that that page be marked 186½.

Page marked "186½."

Q. The assessment against the starcholders appears upon pages 186½ and 187.

A. No.

[fol. 78] Q. On what pages does the assessment against the shareholders of the First National Bank appear in this book?

A. On 186½ and 187.

Q. What number of shares were assessed?

A. 500.

Q. What was the total assessed value on the stock?

A. \$107,000.00.

Q. Did the First National Bank of Hartford, Wisconsin, in 1921, own any real estate?

A. Yes.

Q. In the City of Hartford?

A. Yes.

Q. Did it conduct the banking business that year in the real estate which it owned?

A. Yes.

Q. What is the real estate assessed at?

A. \$17,000.00.

Q. Leaving the balance of the amount of assessment against the shares of stock at what figure?

A. \$90,000.00.

Q. What was the assessed valuation per share of stock as appears from that book?

A. \$125.00 per share.

Q. Look your book over again and see if you are not mistaken in respect to the amount at which each share of stock was assessed?

A. \$180.00. That is right.

Q. You wish to correct your mistake in that regard?

A. Yes.

Q. Against whom were the shares of stock assessed?

A. The stockholders of the bank. The First National Bank.

Q. Get your book out and tell me against whom the shares of stock were assessed? Against individuals or against the bank?

A. Against the bank.

[fol. 79] Q. Don't the names of the individual shareholders appear, and isn't the assessment against them individually?

A. Yes.

Q. Why do you say then that the shares of stock were assessed against the bank?

A. Do you want me to read—

Q. Now, were the shares of stock assessed against the individual who owned the stock, and not against the bank as a bank?

A. No, sir.

Q. Was this stock assessed separate from personal property assessable against individuals residing in the city of Hartford?

A. Separate.

Q. From other personal property against the individuals owning stock?

A. I assessed the way Mr. Guth told me.

Q. Were not these shares of stock assessed individually?

A. Yes, sir.

Q. In making the assessment that year against individuals residing in the city of Hartford, did you assess money capital?

A. How do you mean?

Q. Did you assess money in the hands of individuals?

A. No, sir.

Q. Notes, mortgages, interest bearing bonds?

A. No.

Q. Debts that might have been owing to individuals residing in the city of Hartford?

A. No.

Q. In that respect you followed the statutory provisions of this state as you understood it?

A. Yes.

Q. Do you know what the tax rate in the city of Hartford was for that year—1921?

[fol. 80] A. I don't think I know. For 1921?

Q. Yes.

Mr. J. C. Russell: You will find it in the eighth paragraph of the answer.

Mr. E. W. Sawyer: \$3.17 and seven mills on each \$100.00 of valuation.

Q. Showing you again Page 186½ of this Exhibit No. 1, what does the total amount of the personal property assessed up against the shareholders upon the shares of stock in the First National Bank for the year 1921, come to?

A. \$285,930.00.

Q. Give the figures if you can't read them correctly? Give your statement as to what your tax is in the place that it appears in that books?

A. I don't think I can explain it. I think the City Clerk can explain it better than the Assessor.

Q. What is the amount of these figures?

A. \$2,859.30.

Q. Do all the stockholders appearing upon these pages of this book live in the City of Hartford, if you know?

A. I can't tell, but if I look it over I'll know.

Q. Well, now here, I think we made a mistake on this thing, regarding the pages upon which the shares of stock for the First National Bank is listed?

A. Yes, I said before——

Q. Page 187 contains the assessment made against the Hartford Exchange Bank.

A. Yes, Page 187 is the assessment against the Hartford Exchange Bank.

Q. Yes. And it does not contain the assessment made against the shareholders in the First National Bank?

A. No.

Q. That was a mistake in reference to that page?

A. Yes.

[fol. 81] Q. The pages upon which the assessment against the stockholders in the First National Bank appearing in this book are Pages 186 and 186½. The very first stockholder upon this page is who?

A. On Page 186, H. A. Butterfield, Los Angeles, California.

Q. And he is assessed upon how many shares?

A. 40.

Q. The number of shares testified to against which assessments were made, 500 is right, isn't it?

A. I was told so by Mr. Liver.

Q. As far as you know it is right?

A. Yes.

Q. And the assessed valuation per share at \$180.00 is correct?

A. Well, I think so.

Q. Look in the book, don't think. Be sure. That is what you assessed it at?

A. Yes.

Q. And the total amount of this stock share assessment as testified to is \$2,859.30? Applying to this First National Bank stock.

Court: He testified to that before.

Q. What do you do with that assessment roll after you finish making the assessment?

A. After the Board of Review meets I am done with it, and I leave the book with the clerk in the office and then I am done.

That is all, Mr. Hahn.

Mr. WILLIAM RADKE called and sworn.

Examination by Mr. E. W. Sawyer:

Q. Where do you live Mr. Radke?

A. City of Hartford.

Q. Are you an official of the city of Hartford?

A. Yes.

Q. What?

A. City Clerk.

[fol. 82] Q. Were you such City Clerk in 1921?

A. Yes.

Q. I show you Plaintiff's Exhibit No. 1, being Assessment Roll of the City of Hartford for that year and ask you if the assessment against the property in the city of Hartford as it appears upon this assessment book for the year 1921, was the basis upon which the tax for that year was levied?

A. Yes, sir.

That is all.

Mr. JOHN G. LIVER called and sworn.

Examination by Mr. E. W. Sawyer:

Q. Mr. Liver, where do you live?

A. I live at Hartford, Wisconsin.

Q. How long have you lived in Hartford, Wisconsin?

A. 51 years.

Q. In what business are you presently engaged?

A. In the banking business.

Q. What bank are you connected with?

A. First National Bank.

Q. How long have you been connected with the First National Bank, of Hartford, Wisconsin?

A. 17 years.

Q. Do you hold an official position in that bank?

A. Yes, sir.

Q. What is it?

A. President.

Q. How long have you been President of that bank?

A. Well ever since its existence.

Q. Well how long is that?

A. 17 years.

Q. Have you been an official of any territorial group of the Wisconsin Bankers' Association?

[fol. 83] A. Yes, I was for two years President of Group Five of the Wisconsin Bankers' Association.

Q. Presently Mr. Liver, what districts does Group Five include?

A. That includes the following counties: Dodge, Washington, Waukesha, Walworth and Rock.

Q. Prior to the time that you were engaged in the banking business with the First National Bank, in what business were you engaged?

A. General Merchandise.

Objected to.

Objection overruled.

Q. Where?

A. At Hartford.

Q. And how long had you been in the merchandise business at Hartford?

A. 32 or 33 years.

Q. Has your experience in the merchandise business familiarized you with the conditions in Hartford and surrounding territory?

A. Yes.

Q. What is the population of the city of Hartford?

A. About 4,500 I think.

Q. Does your bank with which you are connected confine its business to the city of Hartford alone?

A. No.

Q. What territory contributory thereto, and what is the nature of the territory tributary to Hartford? What is it used for? What is the territory used for that lies on the South side of Hartford?

A. Farming community.

Q. What kind of farming community is it?

A. Quite prosperous farming community.

[fol. 84] Q. What are the financial conditions?

A. Quite good.

Q. When farmers living around Hartford retire, where do many of them move to?

A. To Hartford.

Q. Are there a considerable number of retired farmers living in Hartford?

A. Quite a number.

Q. And were there in 1921?

A. Oh, yes.

Q. What are the ordinary principal functions of the banking business as conducted by the First National Bank of Hartford?

A. Well, we receive deposits in several ways, and of course loan money to individuals and corporations, we have a savings box department in our bank, we borrow and sell exchange, and other business that may come before a bank—we are there to do that work.

Q. Does the First National Bank of Hartford confine its business operations and functions to the city, or territory tributary thereto?

A. The city and surrounding territory.

Q. Does your bank engage in the business of buying and selling government bonds?

A. Oh, yes.

Q. Notes and mortgages?

A. Yes.

Q. Securities:

A. Yes.

Q. And did it do so in 1921?

A. Yes.

[fol. 85] Q. In addition to discounting commercial paper?

A. Yes.

Q. To what extent or what is the practice of the First National Bank in respect to handling mortgages and notes?

A. We don't handle so many mortgages. We loan on mortgages, and we may buy mortgages, but that is not very largely a part of our business. I had in mind securities of organizations like Wisconsin Farm Loan Association. Of course we buy those bonds.

Q. Do you buy them to keep?

A. Well for our own investment and to accommodate our clients with them.

Q. What has been your practice in respect to disposing of them to clients.

A. Well we dispose of quite a good many.

Q. To whom or how did you dispose of them? To corporations or individuals?

A. Individuals.

Q. Are there any other individuals in the city of Hartford that were engaged in selling notes and mortgages and securities?

A. Yes, sir.

Objected to.

Objection overruled.

Mr. Russell: I ask that all of this line of testimony be received under objection.

By the Court: It may be so noted, and all testimony offered under that line will be received under objection.

Q. And were they so engaged in 1921 and prior thereto?

A. Yes.

Q. Can you name some of those individuals? Or concerns?

A. I can.

Q. Give the Court a statement of a few?

A. Mr. Ed. Russell.

Q. How long had Mr. Ed. Russell approximately been in that line of work in Hartford?

A. I should judge about eight or ten years.

Q. He is a brother to J. C. Russell, the attorney for the plaintiff.

A. Yes, sir.

[fol. 86] Q. Do you know whether he has conducted his business, or whether his business was conducted in a large or small way?

A. Quite extensively.

Q. What other individuals were engaged in the loan business?

A. Charles Sayles.

Q. Where does he reside?

A. At Hartford.

Q. Is there any other concern that is engaged in loaning out money in the city of Hartford?

A. Well there is Mr. Thoma.

Q. Any other association or concern?

A. Yes, the Hartford Building and Loan Association loans money.

Q. Do you know whether any of the real estate firms in that city are engaged in loaning out money to individuals in that community?

A. Yes.

Q. What firms notably?

A. Sauerhering & Gehl make loans on real estate.

Q. You have personal knowledge of that?

A. Yes.

Q. How long have they been in that business, approximately?

A. Well they have been in that business 12 or 15 years I think.

Q. Do you know to what extent, are the loans that are made through these various concerns, to what amounts they run?

A. Why, yes, I have no exact knowledge, but I have heard the report.

Objected to.

Objection overruled.

Q. Don't you know from your knowledge of business circumstances?

A. Well, a large amount.

Q. What do you mean by large amount? Over a million dollars annually?

A. I won't say that. The amount that these concerns had loaned [fol. 87] out to individuals, I should estimate that about \$250,000.00 or \$300,000.00, or may be more than that.

Q. Was that true in 1921?

A. Yes.

Q. In what way Mr. Liever, does this loaning business by these concerns compete with the business of the bank?

A. These loaning concerns compete with the business of the bank in that respect—the same as other banks would be in competition.

Q. Show how the competition affects the banking business and in what way? From what funds do you realize or make your loans?

A. From the bank funds, whatever money we have on hand.

Q. And if the money is withdrawn it affects your loaning department?

A. Certainly.

Q. Are these withdrawals up to and including 1921 substantial in amount?

A. Yes.

Q. Do you know of that personally?

A. Yes, sir.

Q. Are there many withdrawals being made that you have personal knowledge of?

A. Yes.

Q. And how would that compete in amount to what is invested in the capital stock of the First National Bank?

A. It would be a great deal larger amount.

Q. Do you know of other concerns that are engaged in buying and selling securities, mortgages, notes and bonds in that community outside of these local concerns?

A. Yes.

Q. What concerns are they and where are they located?

A. In Milwaukee and Chicago.

Q. What means do they employ in order to place their mortgages and securities on the market?

[fol. 88] A. They come right out to the city and solicit.

Q. What do they do in the way of circularizing?

A. They circularize when they issue the bonds.

Q. Can you name various concerns in Milwaukee that are so engaged? Give some of them that come to your city?

A. First Wisconsin Company of Milwaukee, Morris Fox & Co., Edgar Ricker & Co., Grossman, Lewis & Company, Best & Gregg Co.

Q. And do they cover territory outside of the city of Hartford?

A. Oh, yes.

Q. Now what is the general nature of the securities which they offer?

A. Bonds, notes and mortgages, stocks.

Q. What type of bonds—what kind?

A. Real Estate bonds and utility bonds. Well they offer for sale all kinds of bonds.

Q. What kind of bonds? Tell the Court what for?

A. Bonds on buildings, bonds on farms.

Q. What do they call city bonds ordinarily?

A. Municipal bonds.

Q. Are those bond issues confined to the State of Wisconsin? Or by concerns outside—non-local.

A. Yes.

Q. What is the effect upon the banking business when non-local bonds are sold in the community?

A. Well when the bonds are offered for sale, people draw out their money and buy the bonds.

Q. Where do they draw the money from?

A. Well from savings account and some time certificates.

Q. And the affect of the sales of these bonds and securities is what upon the banking business?

A. It reduces the deposits.

Q. When does that, if ever, get back into the bank?

[fol. 89] A. I don't know if it ever gets back in some instances.

Q. How are the savings accounts built up? What is the process? Slow or rapid?

A. Slow.

Q. You may state whether or not these so-called bond houses sell their bonds and securities in the banking district tributary to Hartford in substantially large quantities?

A. Yes, quite so.

Q. You spoke about the Hartford Building and Loan Association. Did I understand you to say that that was a concern engaged in loaning money?

A. Yes, sir.

Q. Do you know approximately how long they have been in business in the city of Hartford?

A. Eight or ten years.

Q. And in what way does the business that they do compete with the banking business?

A. Well that competes with the banking business the same as the banks do. They receive deposits and make loans.

Q. You mean they take in money?

A. Yes.

Q. Do you know whether it has been their prevailing practice to pay interest upon money they receive?

A. Yes.

Q. What rate?

A. Five per cent.

Q. What are the prevailing rates that the banks pay on their deposits?

A. Three per cent.

Q. What is the effect upon the banking business as far as the Hartford Building & Loan Association is concerned?

A. Well when people know they can get five per cent they prefer to take it there instead of to us.

Q. You have personal knowledge of that?

A. Yes.

[fol. 90] Q. Was that true in 1921?

A. Yes.

Q. In what kind of an account do the merchants and manufacturers put their bulk of their account?

A. In checking account.

Q. Is there a considerable amount carried in certificates of deposit?

A. No.

Q. The certificate of deposit account—a large amount of that is held by whom?

A. Well from retired farmers.

Q. And it is very largely held by individuals?

A. Pretty much of it.

Q. Mr. Liever, do you know from your experience as a banker and from your official connection as President of Group Five of the Wisconsin Bankers' Association, how the situation as you testified to at Hartford compares with the situation in banks generally.

Objected to.

Objection overruled.

A. The situation is the same. The amounts in some localities are very large of course.

Q. I mean the general effect upon competing banking business or upon the way in which money capital competes with the banking business?

A. The effect is about the same all over.

Q. You have attended a great many bank conventions?

A. Yes.

Q. You are familiar with the banking situation in Wisconsin?

A. Yes.

Q. Do you know of a concern operating in this city known as the Ziegler Company?

A. Yes.

[fol. 91] Q. Where is its home office?

A. In West Bend.

Q. In what line of business is it engaged?

A. Real estate and loan business.

Q. Does it do a large amount of loan business in this city?

A. Quite so.

Q. Has it an agency or representative in Hartford?

A. Yes, sir.

Q. How do they push their business?

A. They circularize their loans, solicit in many ways.

Q. Do you know personally of large loans that they have made to individuals in the City of Hartford?

A. Yes, sir.

Q. Does it run up in the thousands of dollars?

A. Yes, sir.

Q. And the nature of their loaning business is relatively large or small?

A. Quite large.

Q. Now Mr. Liever, would the situation that you testified to in the way in which money capital held by individuals in Hartford in that community competes with the business of the National Bank, apply to 1921 as well as it does at the present time?

A. Yes, sir.

Q. There is no change in the situation as far as the years were concerned?

A. No, sir.

Q. Mr. Liever, do you know whether or not the taxes upon the

shares of stock, whether the year 1921 or 1922 have been compromised by various municipalities and banks, in which they are located?

A. Yes.

Objected to.

Objection overruled.

[fol. 92] Q. What situations do you know of that this is true?

A. I know they made settlement in Waukesha, Beaver Dam and Burlington. There was more than that, I know.

Q. Do you know what the situation was in that respect in Milwaukee?

A. I know they compromised in Milwaukee too.

Q. Do you know whether those compromises were made upon the advice of the Wisconsin Tax Commission?

A. That I don't know.

That is all.

Examination by Mr. J. C. Russell:

Q. When was your bank organized Mr. Liever?

A. 1907.

Q. What was the capital stock?

A. \$50,000.00.

Q. Does the bank own its building?

A. Yes.

Q. Does your bank occupy the entire bank building?

A. It occupies the first floor now.

Q. What did you occupy in 1921?

A. Part of the first floor, half of it.

Q. And it owned that bank building in 1921?

A. Yes.

Q. There was a few years that the bank did not own the whole building?

A. Yes, the Realty Company owned one-half of it.

Q. When did the First National Bank own the entire building?

A. In 1910.

Q. Approximately 13 years ago?

A. Yes.

Q. And what are the other parts of the building that are not occupied by the bank, used for?

A. We have two tenants upstairs, a doctor on one side and a real estate firm on the other.

[fol. 93] Q. What real estate firm?

A. Sauerhering & Gehl.

Q. And I believe Dr. Sachse?

A. Yes.

Q. Was that the condition in 1921?

A. Yes. We might have had some one in the office in the rear of that building at that time. I don't remember.

Q. What was the rent taken in from May 1, 1920 to 1921?

A. The rent amounted to \$1500.00 or \$1600.00 a year.

Q. How many people were employed as cashiers or tellers during the year between May 1, 1920 and May 1, 1921?

A. Six people.

Q. Can you give the names?

A. Mr. Rees, Radke, Loppnow, Mrs. Hetzel, Ralph Winterhalter and myself.

Q. Rees was the Cashier?

A. Yes.

Q. Loppnow was Assistant Cashier?

A. No, bookkeeper.

Q. And Radke?

A. He was Assistant Cashier.

Q. And was such in 1921?

A. Yes.

Q. And Mrs. Hetzel bookkeeper and Mr. Winterhalter, bookkeeper?

A. Yes.

Q. And you were President?

A. Yes.

Q. What salary did you receive as president?

A. \$3000.00 a year.

Q. Was that the salary you received in 1920 or 1921?

A. Yes.

[fol. 94] Q. What salary did Mr. Rees receive?

A. \$250.00 a month.

Q. Mr. Lotnow?

A. \$125.00 a month.

Q. What salary did Mr. Radke receive?

A. \$150.00 a month.

Q. Mrs. Hetzel?

A. I'm not quite sure but I think at that time \$90.00 a month I'm not positive about that.

Q. Mr. Winterhalter?

A. \$75.00 a month.

Q. Was there any other money paid to these employees during the year?

Objected to.

Objection overruled.

A. The bank distributed \$500,000 every year among the employees.

Q. That was the amount set aside for the year 1920 to 1921 and distributed between them?

A. Yes, sir.

Q. What surplus did you have on hand May 1, 1921?

A. \$50,000.00.

Q. That was the capital stock?

A. No, sir, I am not quite sure. I have the book there and I can tell. I think I am right though. Yes, \$50,000.00.

Q. What is the surplus usually used for?

A. We use that the same as any other money. Surplus is treated the same as capital stock.

Q. For loaning?

A. No, we don't loan out of the surplus.

Q. Now what were your individual profits in 1921.

A. I think \$3000.00.

Q. Will you refer to the book?

A. \$3,415.00.

[fol. 95] Q. Did your bank on May 1, 1921, own any securities that were exempt from taxation, such as government securities?

A. Yes.

Q. Does your daily statement book show it?

A. Yes.

Q. What was the amount?

A. I don't know whether we had any that was exempt from taxation.

Q. Do you hold any municipal bonds?

A. Yes.

Q. How much did you hold at that time? Give me the amount?

A. I should say in the neighborhood of \$35,000.00 municipal bonds. Such as county and city.

Q. Did you hold government bonds?

A. Yes.

Q. That wasn't included in the municipal bonds?

A. No.

Q. How much government bonds did you hold?

A. \$60,000.00.

Q. Does your daily statement book show it?

A. It don't show that record. It don't show that separate.

Q. Have you any record that would show it?

A. Yes, at home, sure.

Q. You didn't bring them?

A. We were asked to bring—

Q. You were asked to bring all records and statements referring to this case. You will prepare a statement for me of that Mr. Liever I want to know how much money you had invested in non-taxable securities May, 1921.

Objected to.

Court: He don't need to prepare any statement.

Q. Will you produce your records here to-morrow?

A. Yes, sir. We can produce records, of course.

[fol. 96] Q. What rate of interest do these different bonds draw, or non-taxable securities?

A. Non-taxable securities bring now any where from $4\frac{1}{2}$ up to 5% and some less than $4\frac{1}{2}$ %.

Q. Any 6%?

A. No, sir, no non-taxable bond.

Q. Was there any dividends paid by your bank from May 1, 1920 to 1921?

Objected to.

Objection overruled.

A. Yes.

Q. What dividend was paid upon the capital stock?

A. For that year?

Q. Yes.

A. 15%.

Q. Now, was business on the increase or decrease from May 1, 1920 to May 1, 1921?

A. We just about held our own.

Q. How did it compare with previous years?

A. Our business has changed materially the last five years.

Q. Now, what were your deposits on May 1, 1921?

A. \$955,000.00.

Q. What was the average daily deposit for the year from May 1, 1920 to May 1, 1921? The average daily deposit with your bank?

A. I can't say.

Q. Does your daily statement book show that?

A. We would have to figure that out.

Q. How much of that was on open deposit?

A. You mean subject to check, is that what you mean? That average would be in the neighborhood of one-third of the whole money deposited in the bank.

[fol. 97] Q. Would your daily statement book show that?

A. It varies every day. It is about one-third, some time a little more and some time a little less.

Q. One-third would be subject to check?

A. That is not exact.

Q. Your deposits that were subject to check didn't draw interest?

A. No.

Q. How much did you have in certificates of deposit?

A. What date?

Q. On May 1, 1921?

A. Certificate of Deposit on that day, \$322,000.00.

Q. Then you had about \$318,000.00 of open deposits and \$322,000.00 in certificates? Now where was the balance of your deposits at that time?

A. \$249,000.00 in savings.

Q. And your checks on deposits on that day were \$384,000, that makes your \$955,000.00 the first of May. What interest did you pay on the time certificates in 1921?

A. 4%.

Q. On savings account?

A. 4%. Some time during 1921 we were paying 4%. I would have to look at the record for that.

Q. How much interest money did your bank pay out from May 1, 1920 to May 1, 1921?

A. I can't give you that exactly here.

Q. Will you prepare it for me?

A. Yes.

Q. Now was there any sales of stock between May 1, 1920 and May 1, 1921?

A. One transaction—one transfer, Mr. Otto Wollner.

Q. Do you know what the stock sold for?

A. No.

[fol. 98] Q. And previous to that were there any sales of stock for two or three years?

A. No.

Q. Stock can't be bought?

A. Sure it could be bought by paying the price.

Q. You pay the price for anything you buy don't you?

A. Yes.

Q. Now since May 1, 1921, has there been any sales of stock?

A. Yes.

Q. Who sold their stock?

A. Westphal.

Q. Do you know what he sold his stock for?

Objected to.

Objection overruled.

Q. What did Mr. Westphal sell his stock for?

A. For \$225.00.

Q. And the rest of it?

A. I am not quite sure.

Q. He sold it for \$250.00 didn't he?

A. He may have sold some for \$250.00.

Q. When was that?

A. In the last year.

Q. 1922.

A. No, the most of it in 1923.

Q. Now for the year 1921 was there anything charged off for depreciation bonds, notes and securities?

A. I think there was.

Q. How much?

A. In the neighborhood of \$5,000.00 or \$6,000.00, if I remember rightly.

Q. Would your daily statement book show that?

A. No.

Q. What was done with that \$6,000.00 charged off?

A. Struck off from the undivided profits?

[fol. 99] Q. Was that amount actually expended for anything?

A. I think I am off on the \$6,000.00, but whatever it was it was charged off.

Q. Was there any loss on bonds in 1920 to 1921?

A. I don't think there was.

Q. You would remember?

A. Yes.

Q. That \$6,000.00 was allowed for that purpose.

A. It was credited back when it was used for that purpose.

Q. There was \$6,000.00 charged for losses on poor stock, bonds and securities.

A. Yes.

Q. There was no losses on bonds and notes during that year?

A. That was the shortage on the bonds that was charged off.

Q. Was there any loss on bonds or notes? Was there any loss, shortage in value?

A. Yes.

Q. How do you account for that shortage?

A. Depreciation. They depreciated in market value.

Q. What do you mean?

A. Well some bonds in the market brought five per cent and others seven and one-half.

Q. They were held by the bank?

A. I don't know that we had any.

Q. Did you charge off according to market value or according to actual depreciation on bonds and notes held by the bank.

Q. You charged off according to market value?

A. Yes.

Q. Did you dispose of any of those bonds or notes at a loss?

A. One.

Q. How much?

A. \$100.00 or \$150.00.

Q. That was practically the only loss you had that year?

A. That was the only one that was a real loss at that time.

[fol. 100] Q. Now how does your fixtures and your equipment compare in May 1921 with the time the bank was organized. Have you put in any?

A. Yes some, and some were taken out.

Q. How do they compare as far as value is concerned? What was the book value of your furniture and fixtures at the time the bank was organized?

Objected to.

Objection overruled.

A. I think \$2,000.00.

Q. Does your record show it?

A. Yes.

Q. What was the book value of your furniture and fixtures on May 1, 1921?

A. It didn't change any. \$2,000.00.

Q. Your daily statement book shows that?

A. No, we carry them with the capital stock, don't you see. We carried them for \$2,000.00 right along.

Q. Now in 1921, did you- bank either by agent or attorney or personally appear before the Board of Review in the city of Hartford?

A. I am sure we did not.

Q. Now in the City of Hartford, there are several other taxing units, are there not Mr. Liver? They levy taxes besides the city of Hartford?

A. There is a high school in the city of Hartford that is a taxing unit.

Q. Now there is also the south side school district?

A. Yes.

Q. That consists of what?

A. Joint district.

Q. With the town of Hartford?

A. Yes.

[fol. 101] Q. That consists of the First and Fourth Wards of the city of Hartford and a part of the Town of Hartford?

A. Yes.

Q. And that is a separate taxing unit, isn't it?

A. Yes. I don't really know how that operates. They levy their own tax at the annual meeting.

Q. Now in 1921, some time after May 1, didn't you hand Mr. Hahn a statement of the stock, or number of shares held by them in the First National Bank?

A. Not after May 1.

Q. Before?

A. Yes.

Q. You paid your tax in 1922 that were assessed in 1921, didn't you?

A. Yes.

Q. And what was that amount?

A. I don't know just now.

Q. It was \$2,859.30?

A. I think so.

Q. Did the City of Hartford make any demand on the First National Bank to pay that tax of \$2,859.30, either in person or by agent?

Objected to.

Objection overruled.

A. The 1921 taxes were paid.

Q. Was any demand made by any official of the city of Hartford that the bank pay that tax?

A. I don't think so.

Q. You simply went there and paid your tax under protest?

A. I think that is right.

Q. Do you know?

A. Yes.

[fol. 102] A. We paid the tax.

Q. No official or no agent of the city of Hartford ever demanded the payment of that tax? You simply went there and paid your tax there under protest.

A. We had protested before and paid the tax.

Q. When had your protested?

A. I don't know when.

Q. You hadn't protested as a matter of fact?

Objected to.

Objection overruled.

Q. You simply went down there and paid your tax under protest and got their receipt?

A. We had protested before.

Q. Before 1921?

A. I don't know how that was, we paid one under protest, that I know.

Q. That was in 1922?

A. May be so.

Q. At the time you paid your taxes for 1921? Is that right?

A. We protested. We put in our protest at the time we paid them.

Q. You paid them under protest?

A. Yes.

Q. Have the deposits of \$955,000.00, the same as you testified here, any value as a going asset in your bank business?

A. It has a value to somebody.

Q. Has it to the bank?

A. I think it has.

Q. What would you say was the reasonable value of a deposit of \$955,000.00 May 1, 1920?

A. That would depend on conditions a good deal.

Q. You are a banker, aren't you?

A. Yes.

Q. You have had considerable experience, haven't you?

A. Yes.

[fol. 103] Q. And you have attended Bankers' Associations and Conventions?

A. Yes.

Q. Well what would you say was a reasonable value on the \$955,000.00?

A. I would say \$955,000.00 as an asset. I wouldn't state any value on that.

Q. Have you any idea?

A. No.

Q. Was it worth \$25,000.00 as an asset? Was it worth \$50,000.00?

A. I don't know.

Q. Now what was the par value of the shares of stock of the First National Bank?

A. \$100.00 a share.

Q. That was the par value in 1921?

A. Yes, sir.

Q. How much did you take in from May 1, 1920 to May 1, 1921, as box rent?

A. I don't know. I haven't got that with me.

Q. Did you have saving deposit boxes in that bank in 1920 and 1921?

A. Yes.

Q. Now you rent those boxes out?

A. Yes we do.

Q. Now what was the amount of rent you took in for these rented boxes from May 1, 1920 to 1921?

A. I don't know.

Objected to.

Objection overruled.

Q. Haven't you any idea?

A. In the neighborhood of \$400.00 or \$450.00.

Q. Now you stated that Sauerhering & Gehl are in the loaning business? And the fact that they make loans causes losses from your bank, does it not?

A. Yes.

Q. Is Mr. Sauerhering a stockholder in your bank?

A. Yes, sir.

Q. Where does he do his banking business?

A. I think with us.

[fol. 104] Q. Now Mr. Sauerhering and Mr. Gehl and Mr. Sayles and Mr. Thoma, they do business many miles from Hartford, and they bring in money outside of the area of the business outside of the First National Bank, do they not?

A. I don't think so.

Q. Now, this million dollars that you testified to, how much of that came out of the First National Bank?

A. I don't know.

Q. \$100,000.00?

A. I shouldn't wonder, or more. More than that among the parties you mentioned.

Q. Now does Sauerhering & Gehl or Ed. Russel or Thoma, have they savings accounts?

A. With us?

Q. Yes.

A. They receive money.

Q. What do you mean by that?

A. Well they receive money from their clients and put it in the bank or loan it to somebody else.

Q. Does Mr. Sayles deposit money in the bank?

A. Yes.

Q. The Building and Loan Association?

A. Yes.

Q. You do practically all their business?

A. Yes, we do some of it. There are lots of those concerns, like the Building and Loan Association that takes deposits and hold them as deposits. They take in money I know.

Q. They don't hold it on their person?

A. They may.

Q. Do they keep it in their office?

A. They may.

Q. Do you know?

A. I don't know what they do with it for the time being.

Q. Now, when you refer to this million dollars, did you say that there was a million dollars loaned in one year?

A. I don't say one year.

Q. How much did you say was loaned?

A. I think it was \$250,000 or \$225,000 a year.

[fol. 105] Q. Where were these loans principally made?

A. Western country.

Q. You claimed that they deteriorated the value of the stock in the First National Bank of Hartford?

A. I didn't make such claim.

Q. What was your object in stating that they were in competition in doing business?

A. Well I claim they are competition.

Q. Now did they at any time as long as they are in there in any way lessen the value of the stock of the First National Bank?

A. It certainly hasn't increased it. I haven't kept track of it.

Q. You testified they are in competition?

A. Certainly.

Q. What outside Companies, outside of this area, were doing business in the city of Hartford?

Court: He already named a number of them.

Q. You assisted them time and again?

A. No, sir, I have not.

Q. Didn't you sell bonds for them?

A. No, sir.

[fol. 106] Q. Didn't you handle bonds for them?

A. We handled our own bonds, bonds for ourselves.

Q. What do you mean?

A. Bonds that we buy for our own investment.

Q. You invest in bonds quite frequently?

A. Municipal bonds, yes.

Q. Do you purchase them direct or buy them through some bonding house?

A. Either place.

Q. Where have you ever bought any outside directly from the municipality?

A. Washington County bonds.

Q. How much did you buy?

A. \$15,000.00 or \$20,000.00 at one time.

Q. How much in May, 1921?

A. About \$7,000.00 or \$8,000.00.

Q. Don't you own about \$25,000.00 of Municipal bonds?

A. I told you about \$30,000.00 or \$35,000.00.

Q. Where you buy these bonds, are these some of the concerns that are in competition with you?

A. We buy some of their bonds.

Q. Is it your claim that some of these are in competition with you in the city of Hartford?

A. It might be so.

Q. When did you notice any withdrawals from the First National Bank by virtue of those concerns being in competition with the bank?

A. We have had that before us for the last ten or twelve years.

Q. That is true in all localities?

A. I don't know.

Q. Who is Morris Fox & Co.?

A. They are a bonding house in Milwaukee.

Q. Do you deal with them?

A. Never.

[fol. 107] Q. What about the First Wisconsin Company?

A. We have done business with them.

Q. Bought bonds?

A. We have.

Q. You testified that they are in competition with you at Hartford?

A. We buy Government Bonds from them.

Q. This is one of the Companies you claim is in competition with the bank of Hartford?

A. I don't think they come in competition with us.

Q. You named them in your direct examination as a concern that was in competition with you in your business at Hartford?

A. I said they were one of the concerns that was selling bonds at Milwaukee.

Q. And in competition with your bank at Hartford?

A. No, sir. I don't think so.

Q. They might be?

A. They could I suppose. I named them as one of the concerns selling bonds.

Q. In Milwaukee?

A. Yes.

Adjourned to 1.30 o'clock in the afternoon.

Q. Referring back to the year 1920 to 1921, do you know what the loan value was on the shares of stock of the First National Bank?

A. No, sir.

Q. Approximately?

A. No, sir. There was no loan value established.

Q. Now with a \$50,000.00 capital stock, \$50,000.00 surplus, \$3,415.00 of undivided profits and a deposit of \$955,000.00, what would you say was a fair price for the capital stock.

A. According to your figures there it would be about \$200.00.

Q. Wouldn't it reach \$250.00?

A. No, it would not.

Q. Could it be bought at that time for \$250.00?

A. I think so.

[fol. 108] Q. Do you know of anybody that would sell for that?

A. I have nobody in mind.

Q. Have you got the quarterly statements for April 28, 1921 and June 30, 1921?

A. Yes, sir.

Quarterly statement for April 28, 1921, marked "Defendant's Exhibit No. 1."

Q. I show you Defendant's Exhibit No. 1, Mr. Liever, what does that show your surplus on April 28, 1921?

A. Just \$50,000.00.

Q. What does it show your undivided profits to be?

A. \$15,318.06.

Q. What does that show your total deposits to be?

A. \$962,000.00.

Defendant's Exhibit No. 1 offered in evidence.

Court: Received.

Q. I show you here quarterly statement of June 30, 1921. What does that show your surplus?

A. \$50,000.00.

Q. And what were the undivided profits?

A. \$12,991.98.

Q. I Notice here, Reserved for interest and taxes accrued, \$35,604.63?

A. Well, this is just the undivided profits you see carried over here, less current expenses, interest and so on. Now here you see at one side our books show \$35,604.63, undivided profits, less reserved for interest, less current expenses, interest and taxes paid, \$22,612.65.

Q. That leaves your undivided profits at that time, \$12,991.98?

A. Yes.

Q. What is the amount of taxes paid between your quarterly statement of April 28, 1921 and this statement of June 30, 1921?

A. That might not affect taxes at all. It is current expenses and interest.

Q. Do you know what the interest was that was paid during that interval?

A. I can't say.

We offer this statement in evidence.

Court: Received.

[fol. 109] Q. Have you the report of the Comptroller of Currency for the years of 1921 and 1920?

Mr. Sawyer: Are those regular reports or are they part of our quarterly statements?

A. They are regular reports to the Comptroller of Currency taken from our records.

Statement marked "Defendant's Exhibit No. 3."

Q. I show you Defendant's Exhibit No. 3. What is that Mr. Liever?

A. That is the report of the First National Bank of Hartford to the Comptroller of Currency at the close of business on February 24, 1921.

Offered in evidence. Court: Received.

Statement marked "Defendant's Exhibit No. 4."

Q. I show you Defendant's Exhibit No. 4. What does that purport to be?

A. It is a report like the other one, Report to Comptroller of Currency as of Sept. 6, 1921.

Offered in evidence.

Court: Received.

Q. Is Mr. Andrew Esser a stockholder in your bank?

A. Yes, sir.

Q. And Mr. E. W. Sawyer?

A. Yes, sir.

Q. Did you attend the annual high school meeting for the year 1921?

Objected to.

Objection overruled.

A. I could not say, I don't know whether I did.

Q. Did you attend the District meeting for District No. 4

A. No, sir.

Q. Mr. Esser is the Treasurer of the High School?

A. He is.

Q. And was in 1921?

A. I think he was.

Q. And Mr. Sawyer the director?

A. I guess so.

That's all.

[fol. 110] Examination by Mr. E. W. Sawyer:

Q. If you did attend the meeting of the High School at the time referred to, did you attend in your capacity as a director or an official or stockholder of the bank? Did you attend as an officer of the bank or stockholder?

A. No, sir.

Q. Or as a member of the board of directors?

A. No, sir.

Q. In the event that a shortage is made on account of the loss sustained or a depreciation in securities, against what fund does that come out?

A. Undivided profits.

Q. At the time of the statement bearing date April, 1921, called the Defendant's first exhibit, wherein undivided profits are stated at approximately \$14,000.00 had interest then payable by the bank been charged off?

A. In April? No, sir, not interest. Not after January.

Q. When does the next charge off of interest come after Jan. 1 of that year?

A. June 31.

Q. What was the approximate book value of the shares of stock in the Plaintiff's bank in May, 1921? Had the interest then payable since the preceding January been charged off?

Objected to.

Objection overruled.

A. That statement there will show just about what the book value is. In the neighborhood of \$200.00 a share.

Q. Mr. Russell, have you got the original notice of protest that was made at the time of the payment of taxes in 1921?

A. I haven't got it. I think Mr. Radke has it.

Offered in evidence and marked "Plaintiff's Exhibit No. 2."

Court: Received.

Q. I show you Plaintiff's Exhibit No. 3, Mr. Liever, look at it and tell the Court what it is?

Marked "Plaintiff's Exhibit No. 3."

A. You want me to tell what it is?

Q. Yes.

A. This appears to be a tax receipt.

Q. For what year?

A. January 2, 1922.

[fol. 111] Q. Tax receipt for farm or personal property?

A. Personal property of the First National Bank of Hartford.

Q. Issued for what year? What taxes?

A. 1921 taxes.

Q. Paid when?

A. Jan. 2, 1922.

Q. Look at the date?

A. Paid Feb. 28, 1922.

Q. Was the check that accompanied that receipt cashed?

A. Yes, sir.

Q. By whom?

A. City Treasurer.

Offered in evidence.

Court: Received.

Q. I noticed that there is a difference in the amount shown on the notice of protest and the personal property receipt. What is that difference made up of?

A. The difference is in the real estate which our bank holds. Our bank building and property.

Q. You spoke about procuring some \$20,000.00 of Washington County bonds. What disposition has been made of those bonds?

A. Well we sold those bonds right at home. Mostly to our clients.

Q. Under what circumstances did you come to sell them?

A. Well our clients come in and inquire for investments and we show them what we have.

Q. How do you come to sell them?

A. Well in the same way, they inquire for investments and we tell them what we have.

Q. A matter of service to the people?

A. Yes. We think we give them pretty good investments.

Q. Mr. Russell, this morning, asked you the question as to what amount of municipal bonds the bank had and I believe you stated some \$30,000.00 on May, 1921?

A. I think it is about that amount?

Q. And those are carried as what? Asset or liabilities?

A. Assets.

[fol. 112] Q. Are they figured in with the amount of your undivided profits and surplus?

A. No.

Q. How do you determine them?

A. They are an asset just the same as the capital is?

Q. How do you determine the amount of your undivided profits are?

A. Anything that we have over capital and surplus.

Q. How do you arrive at that? In other words you take the liabilities and assets and the amount of assets exceeding the liabilities, constitutes the undivided profits?

A. Yes.

Q. In the event, Mr. Liever, that money for what, or for which loans to individuals had not been made and withdrawals from your bank, what effect would it have upon the loaning power of your bank?

A. In the event these loans had not been made and these funds not withdrawn, it would strengthen the loaning power.

Q. In the event they had not been withdrawn?

A. Yes, sir.

Examination by Mr. Russell:

Q. Did your bank engage at that time in the selling of mortgages?

A. Negotiate mortgages.

Q. Since then?

A. Yes, we have some times turned over mortgages to our clients.

Q. Negotiate any for the bank alone. Through the bank?

A. How do you mean?

Q. Why through the Hartford Building & Loan Association?

A. We have never handled any of their mortgages.

Q. Have you been interested in obtaining federal loans?

A. Yes, we made one federal loan about six months ago.

Q. Has your bank been in the business of selling mortgages of any description?

A. No we haven't been in the business, but we have taken mortgages and turned them over to our clients.

[fol. 113] Examination by Mr. Sawyer:

Q. Do you personally have any money out on interest bearing securities?

A. Why, I have a little.

Q. Approximately how much?

A. I might say \$10,000.00.

Q. What is the interest income from that?

A. Well that might average $5\frac{1}{2}\%$.

Q. Putting it at the outside figure?

A. Not over 6%.

Q. Bringing an income of how much?

A. \$600.00.

Q. And what is the maximum income tax that you have paid upon that interest income?

A. Why on an investment of \$10,000.00, my income tax, as near as I can say it now, would be about \$17.00 or \$18.00.

Q. And if you invested \$10,000.00 in the capital stock of the First National Bank of Hartford in 1921, what would have been your tax upon that investment?

A. My tax would have been approximately \$300.00.

That is all.

Mr. Russell:

Q. Is \$10,000.00 the actual amount you have out on interest?

A. About.

That is all.

[fol. 114] Mr. HUGH W. GROVE sworn.

Examination by Mr. Foley:

Q. Mr. Grove, you are a resident of Milwaukee, are you not?

A. Yes, sir.

Q. And you are employed by the First Wisconsin Company in that city?

A. Yes, sir.

Q. In what capacity?

A. As Treasurer.

Q. And what business does the First Wisconsin Company conduct?

A. Engaged in the underwriting, wholesaling and general distribution of bonds and investment securities.

Q. In general it is engaged in the so-called bond business?

A. Yes, sir.

Q. Will you state your experience in that business?

A. At least five years.

Q. Entirely with the First Wisconsin Company?

A. And its predecessor company.

Q. In 1921, what was the extent of the business of the First Wisconsin Company in the sale of bonds and other securities?

A. Many million dollars.

Q. Approximately \$100,000,000.00?

A. No, sir, not that large, less than \$100,000,000.00 and more than \$25,000,000.00.

Q. In what territory does the First Wisconsin Company sell its bonds?

A. In the State of Wisconsin and the upper peninsula of Michigan and occasionally outside of the State.

Q. Is a very large proportion of the bonds you sell sold in Wisconsin?

A. Yes, probably in excess of 90%.

Q. And are those bonds sold to individuals or corporations?

A. Both.

Q. Can you state the proportion?

A. Largely to individuals.

[fol. 115] Q. Can you state the average return on the securities, what the average return on the securities that you sell is?

A. Now?

Q. In 1921?

A. In 1921, on corporation securities the average return was probably 7%.

Q. What was the maximum return?

A. Well about 8%.

Q. About 8%?

A. Maximum, yes.

Q. And are there other firms and individuals engaged in the selling of bonds in the city of Milwaukee? X

A. Many of them.

Q. Would you say that there were a 100 engaged in that business?

A. In the city of Milwaukee, I would not say there were that many.

Q. Could you give the names of some of the persons who are in or who were in that business in 1921?

Objected to.

Court: He may name some.

A. Yes, I could give a good many of them. Second Ward Securities Company, Morris Fox & Company, Henry C. Quarles & Co., Edgar Ricker & Company.

Q. Are there individuals in Milwaukee engaged in the selling of bonds?

A. Yes, sir.

Q. A large number of them?

A. I suppose if you want to take the time to compile a list of them there would be a large number.

Q. They sell their bonds in the State of Wisconsin?

A. Quite largely. Extensively throughout the state.

Q. Do you know how the stock of the First Wisconsin Company is held?

A. Yes, sir.

Q. Will you state?

A. The capital stock of the First Wisconsin Company is divided [fol. 116] into preferred stock and common stock. The preferred

stock is held very largely by the stockholders of the First Wisconsin National Bank. All of the common stock excepting directors' qualifying shares are held for the benefit of the present and future stockholders of the First Wisconsin National Bank.

Q. There is quite a direct relation then between the First Wisconsin Company and the First Wisconsin National Bank?

A. Yes, sir.

Q. Affiliated capital?

A. Yes.

Q. Can you state the reason for that affiliation?

A. I can tell you the reason for it, yes. The First Wisconsin as such transacts the investment business which would naturally come to such affiliated institutions, and inquiries which come to the affiliated institutions, are turned over to the First Wisconsin Company, it being in that business. In that respect it relieves the bank of that work.

Q. Is there competition between bonding companies as such and National banks?

A. Yes.

Q. And I suppose in that sense, the First Wisconsin Company conducts some of the business that would ordinarily be conducted by the First Wisconsin National Bank?

A. Yes.

Q. Will you state to the Court how a bonding Company comes into competition with National banks?

A. It would come into competition with a National bank in two ways, competition for capital and competition for money which would ordinarily be on deposit with the bank.

Q. By competition for capital, what do you mean?

A. Well in order to establish a National bank it is necessary to sell its stock and somebody has to furnish the money to buy the stock. Bonding houses are also soliciting those people who have funds for investment in securities, and naturally if all of the people who have funds to invest invested it in securities other than bank stock, the bank would be hard pressed to obtain capital on which to operate, and in that sense they are in competition for capital.

Q. Does the First Wisconsin Company pay an income tax?

A. Yes.

Q. And might there not be competition for capital between Companies such as the First Wisconsin Company and the National Bank?

A. Well people investing their money in investment securities pay income tax.

Q. What is the capital stock of the First Wisconsin Company?

A. \$600,000.00 of preferred stock and 10,000 shares of no par value common stock.

Q. From your knowledge of the investment business could you [fol. 117] state as to whether, or in the aggregate the amount of money invested in bonds and other investments and securities in the State of Wisconsin in 1921?

A. To give you a definite figure would be the wildest guess. It runs into many many million dollars.

Q. Your statement that it would be a guess is not directed to the fact that there are many millions?

A. As to the number of millions, I can't say. I can't tell you if it was one hundred million or a billion.

Q. At least it runs into the millions?

A. Yes.

Q. And is there a very large proportion of that held by individuals?

A. Yes, a very substantial proportion of it.

Q. Do you know the amount of capital stock, undivided profits and surplus of National Banks in the State of Wisconsin in 1921?

A. In round numbers, yes. Of National Banks, between fifty and fifty-five million dollars.

Q. And could you give similar figures for State banks?

A. Slightly in excess of that. Between fifty-five and sixty millions.

Q. Can you state as to whether the amount of money invested in bonds and other investments, exceeds the amount invested in National and State Banks in Wisconsin?

A. Yes, sir. Exceeds it many times.

Q. Was that true in 1921?

A. It was.

Q. You stated that there was competition for business between National banks and bonding companies or individuals engaged in selling bonds?

A. Yes, sir.

Q. Will you explain how that competition takes place?

A. That competition might arise in several ways. It might arise directly in that National Banks are authorized to buy and sell securities, or competition would arise in the money which the two institutions would lend. I apprehend that one of the functions of National Banks is to lend money. Investment houses dealing in all kinds of securities would come into competition with such loans especially in short time loans.

Q. Where is this money that is awaiting investment largely held?

A. By individuals.

Q. And I suppose a large part of it on deposit in National banks?

A. Yes, sir.

[fol. 118] Q. And when that is invested, what happens?

A. Money is withdrawn from the banks by the depositor to pay the vendor of the bond.

Q. Are you acquainted with any individuals in Milwaukee engaged in making personal loans or individuals engaged in selling bonds or securities?

A. Yes, I know several of them.

Q. And does the aggregate of their loans made in that way amount to a very substantial amount?

A. Yes, sir. Even those that I am acquainted with.

Q. And there are many that you are not acquainted with, and if you took the trouble to compile a list could you compile a lengthy list?

A. A long list with a large number of names.

Q. Are there others engaged in selling mortgages?

A. Many of them.

Q. Individuals?

A. Yes, sir.

Q. And was that true in 1921?

A. Yes, sir. It was.

Q. And are there any of the so-called Acceptance Companies in Milwaukee?

A. There were. I couldn't say whether there are any now or not. There were in 1921.

Q. And what was the business of those companies?

A. Lending money.

Q. Discounting commercial papers?

A. Yes.

Q. And do they compete with National Banks?

A. Directly.

Q. In what way do they compete with National Banks?

A. Their very business is one of the functions of National Banks. The discounting of notes.

Q. Have the so-called acceptance companies and individuals taken over a large part of the business of National Banks?

A. In my judgment Acceptance Companies do handle large sums.

Q. Are you acquainted with any individuals engaged in selling foreign exchange in the State of Wisconsin?

[fol. 119] A. I know that there are such individuals.

Q. And does the business conducted by them come into competition with National Banks?

A. Directly, yes.

Q. Do you know whether the American Express Company is engaged in selling foreign exchange?

A. Yes, sir.

Q. And selling foreign exchange, is that one of the functions of National banks?

A. It is.

Q. So that there would be direct competition?

A. Yes, sir.

Q. The bond issues which are sold by the Wisconsin Company, are they largely local issues or issues from without the State?

A. Both.

Q. A great portion from out the State?

A. Yes, a substantial amount.

Q. And when these bonds are sold in the State of Wisconsin, where would the money go?

A. It would be where the obligor company is located. I can answer your question by saying that a large proportion of it would go to the East.

Q. Now these various bond houses that you have mentioned as located in Milwaukee, do you know whether their stockholders are citizens of the State of Wisconsin?

A. Very largely so. They might have a few outside of the State,

but not very many. They would be residents of the State of Wisconsin. Some of these companies that I have named are partnerships, in which case the partners are residents of Milwaukee.

Examination by Mr. John C. Russell:

Q. How did you say you were employed by the First Wisconsin Company?

A. As Treasurer.

Q. Are you a stockholder in that company?

A. A preferred stockholder, yes, sir.

Q. What dividend did that Company pay in 1921?

A. 7%.

Q. Is the First Wisconsin Company in any way affiliated with the First Wisconsin National Bank?

[fol. 120] A. It is.

Q. How?

A. Its Board of Directors are the same, and in 1921 the President was the same. The President of the First Wisconsin National Bank and the President of the First Wisconsin Company and three Vice Presidents of the First Wisconsin National Bank were also Vice Presidents of the Wisconsin Company, the First Wisconsin Company.

Q. And the First Wisconsin Company is in competition with the First National Bank in the sale of bonds?

A. Yes, sir. Assuming for that answer that one of the functions of the National Bank is selling bonds.

Q. And how long has the First Wisconsin Company been organized?

A. January 2, 1920.

Q. And did the First National Bank of Wisconsin organize the First Wisconsin Company?

A. I think I know what you mean. The First Wisconsin National Bank through its officers and directors organized the First Wisconsin Company.

A. I think I know what you mean. The First Wisconsin National Bank through its officers and directors organized the First Wisconsin Company.

Q. In other words they organized a Company that was in competition with their own bank?

A. They organized it to take over two of the functions of the First Wisconsin National Bank.

That is all.

Mr. EDWARD C. SCHAUER called and sworn.

Examination by Mr. E. W. Sawyer:

Q. Where do you live Mr. Schauer?

A. Hartford, Wisconsin.

Q. How long have you lived there?

A. Twelve years.

Q. Is there an organization in Hartford known as the Hartford Building & Loan Association?

A. Yes, sir.

Q. Are you an officer of that Association?

A. I am.

Q. What?

A. Secretary and Treasurer.

Q. How long have you held that office?

A. Since December 1, 1916.

[fol. 121] Q. You were such Secretary and Treasurer during the year 1921?

A. Yes, sir.

Q. And have been since?

A. Yes, sir.

Q. Is that Association engaged in the business of loaning money?

A. Yes, sir.

Q. How long has the Hartford Building & Loan Association been doing business over at Hartford?

A. Since December 1, 1916.

Q. What territory tributary to Hartford does it carry on its operations?

A. Within 25 miles of Hartford.

Q. And is the Association permitted to loan money to individuals within that territory?

A. Only to members. To any one in that territory who might become a member.

Q. You are permitted to loan to farmers as well as to city people?

A. Our loans are restricted to farmers and home owners.

Q. Now where do the individuals from whom the Association receives its revenue largely reside? Where do the people or individuals from whom the Association receives its revenue largely live?

A. Within a radius of 25 miles of Hartford.

Q. Now what proportion of them from whom it is received live within a radius of ten miles of Hartford?

A. Oh I should judge about 90%.

Q. Does the Association follow the practice of receiving money from individuals in that community and issuing for the money received a paper called a stock certificate?

A. Yes, sir.

Q. In case the entire amount of money is loaned by the individual to the Association at one time, what do you call the certificate issued to the individual therefor?

A. A paid up stock certificate.

Q. What privilege or right, if any, has such individual to receive his money back?

A. Upon thirty days notice in writing.

Q. He may withdraw what he has invested?

A. Yes, sir.

[fol. 122] Q. In the event that he withdraws money upon a thirty day notice, what percentage of money on the principal has the asso-

ciation prescribed in respect to paying such holders of such stock certificates?

A. The amount agreed upon when placing the money in the Association.

Q. What is the present prevailing rate?

A. Five per cent.

Q. That is paid to the holder of a fully paid stock certificate?

A. Yes.

Q. And how long has that rate prevailed?

A. Since 1920, I think.

Q. Prior to that time did a higher rate prevail?

A. Yes, we have paid as high as $5\frac{1}{2}\%$ and as low as 4% .

Q. How often are these payments required to be made to the holders of such papers?

A. The dividends are required to be paid the last day of December and the last day of June of each year.

Q. And if I understand you correctly, a holder of one of these fully paid certificates is required to be paid what ever rate is paid every six months, and for the last three years including 1920 and 1921, that rate has been 5% ?

A. Yes, sir.

Q. Is the privilege of placing money and receiving such a certificate restricted to any particular class of people within your territory?

A. No, sir.

Q. What has been the practice of the association since it was organized in receiving all funds or moneys so brought to the Company?

A. The practice has been to receive the money and place it in the Depository voted by the association.

Q. Has the Company during any time it has been doing business ever refused to take such money? When and under what circumstances?

A. We have refused to take paid up stock money during the period of 1923, from about the first of March until the first of April.

Q. And that was for what reason?

A. Because our demands were not as great as the receipts.

Q. It was during the period that the United States Government was redeeming the, or paying the War Savings Stamps of the 1923 issue?

A. Yes, sir.

[fol. 123] Q. And it was for that reason that you were flooded with funds?

A. Yes, sir.

Q. Excepting for that period, has the Association always taken money from those offering it?

A. Yes, sir.

Q. I understand that this practice is open to all individuals within your territorial limits?

A. Well, as I explained, we can receive money from outside of the 25 mile radius, but we can only make loans within a radius of 25 miles.

Q. Well then the practice is open to all people, to bring money to the association and receive a certificate for it?

A. Yes, sir.

Q. In the case that an individual does not care to acquire a paid up certificate, but desires to pay into the Association, what form of a certificate is issued to him?

A. We issue an installment stock certificate.

Q. And has the individual holding the so-called stock certificate the same privilege of demanding and receiving his money that the holder of a paid up stock certificate has?

A. No, sir.

Q. In what respects to their rights differ?

A. Installment stock certificate can withdraw their entire amount of money paid in at any time, but is penalized if he withdraws within one year. He will receive no dividends. If he withdraws after one year he will receive 70% of the dividends granted.

Q. In any event he would receive, he would be entitled to receive his entire principal paid?

A. He would also receive his entire principal. Of course the by-laws provide that a thirty day notice be given.

Q. Supposing that a holder of a so-called stock certificate does not withdraw until after the certificate is matured, what, if any, forfeiture of accumulations upon the earnings does he incur?

A. He doesn't incur any, but is compelled to surrender his stock.

Q. What do the greatest portion of the net proceeds of the earnings of the association consist?

A. The interest received from mortgage loans.

Q. And as the Company receives its revenues it re-invests its funds?

A. In first mortgages.

Q. And the interest received from these first mortgages or loans is the principal source of your earning power?

A. Yes, sir.

Q. And the individuals who are members of your organization receive their proper share of the net interest earnings when accumulations are pro rated?

A. Yes.

Q. Are there any dues payable to the Association by the holders of the so-called fully paid certificates?

A. No, sir.

Q. Mr. Schauer, have you with you the record of the financial condition of the Hartford Build- & Loan Association at the close of business on December 31, 1921?

A. Yes, sir.

Q. What amount of loans, mortgage loans, were outstanding at the close of business of your Association at that time?

A. \$136,664.86.

Q. Were there any other loans outstanding at that time besides the mortgage loans?

A. Yes, sir.

Q. What is that amount?

A. \$1,740.00.

Q. What kind of a loan is that?

A. That is what we left as a stock loan made to a member or holder of stock who borrows money from his own account.

Q. What was the amount of the holders of paid up stock at that date?

A. \$77,502.71.

Q. Does that represent individuals that held the so-called five per cent fully paid stock?

A. Yes, sir.

Q. And what was the amount of outstanding installment certificates on that date?

A. The amount in dollars?

Q. Yes, sir.

A. \$43,691.85.

Q. Together, what do they amount to?

A. \$121,194.56.

Q. Have you statements showing the amount or condition of the business of this association for the period ending June 30, 1923?

A. Yes, sir.

[fol. 125] Q. What was the amount of outstanding mortgage loans that the Company had at that date?

A. \$187,483.77.

Q. And what amount of stock loans?

A. \$113,524.44.

Q. You misunderstood me?

A. \$2,737.34.

Q. And what was the amount as represented by individuals holding these so-called paid up stock certificates at that date?

A. \$113,524.44.

Q. And what amount at that date were holding installment certificates?

A. \$62,549.41.

Examination—Mr. John C. Russell:

Q. When people bring money to the Building and Loan Association and turn it over, what is done with that money?

A. I receive the money, give them a certificate and take it as soon as we have a reasonable amount together down to the First National Bank of Hartford, and place it on a check account.

Q. And the First National Bank gets practically all of your business?

A. It has done all of our business since we organized, yes, sir. That is all.

Examination by Mr. E. W. Sawyer:

Q. Your purpose in taking it there is, well to leave it there until you want to take it out?

A. We aim to keep our money working.

Q. And the large amount of loans that you have now requires it?
A. Yes, sir.

Examination by Mr. John C. Russell:

Q. Do you have considerable amounts on deposits at the First National Bank?

A. Yes, we had this Spring as high as \$14,000.00, at one time.

Q. Drawing interest?

A. No, sir.

Examination by Mr. E. W. Sawyer:

[fol. 126] Q. That was an exceptional condition of affairs, was it not?

A. Yes, sir.

Q. During 1921 you were quite an extensive borrower from the First National Bank?

A. No, I don't think very much.

That is all.

Mr. J. G. LIEVER.

Examination by Mr. J. C. Russell:

Q. Who were the directors of the bank on May 1, 1921?

A. Well, Mr. Kissel, Otto, W. E. Sauerhering, E. W. Sawyer, Peter Westenberger, A. G. Laubenstein, J. H. G. Lieven, Bruno Jordan, J. G. Liever and August Westphal.

Q. The stock in the First National Bank was for some years previous to March 1, 1921?

A. Yes, sir.

Q. How long?

A. Ever since we started.

Q. In 1920 and 1921 was your bank in the business of selling farm bonds?

A. Wisconsin Farm mortgage loans, yes, sir.

Q. Where do you get those bonds from?

A. From the Wisconsin Securities Company in Milwaukee.

Q. How extensive a business did you do in that line?

A. Oh, we sold in 1921 in the neighborhood of \$30,000.00 or \$40,000.00.

Examination by Mr. E. W. Sawyer:

Q. Under what circumstances were those bonds bought and sold?

A. In the first place they were bought for our own investment, but we sold some to our clients when they wanted an investment, a good investment.

Q. But that was not the prime purpose of purchasing them when you bought them?

A. Oh, no.

That is all.

Mr. W. T. LEINS sworn.

Examination by Mr. E. W. Sawyer:

Q. Where do you live Mr. Leins?

A. In West Bend.

[fol. 127] Q. Are you an official of Washington County, Wisconsin?

A. Yes, sir.

Q. What official?

A. Register of Deeds.

Q. How long have you been Register of Deeds of Washington County, Wisconsin?

A. Nearly seven years.

Q. Were you such Register in the year 1921?

A. Yes, sir.

Q. As such, have you the custody of the records of real estate mortgages in this county?

A. Yes, sir.

Q. Have you made a compilation of the amount of mortgages that were recorded in Washington County, Wisconsin, in the year 1921, in which the mortgages were individuals?

A. Yes, sir.

Q. When did you make that compilation?

A. Yesterday.

Q. At whose request?

A. At your request.

Q. What is the amount of these mortgages?

A. \$1,507,810.54.

Q. So far as you know, were the mortgagees residents of this State?

A. It is very seldom that we have any mortgages to record in which the mortgagees are non-residents.

That is all.

Mr. C. W. SAYLES sworn.

Examination by Mr. E. W. Sawyer:

Q. Mr. Sayles, where do you live?

A. Hartford.

Q. How long have you lived in Hartford?

A. About 20 years.

Q. What business have you been engaged in say during the last 10 years?

[fol. 128] A. Selling mortgages.

Q. Where do you do your business?

A. In Hartford and vicinity.

Q. What amount of outstanding mortgages have you sold to individuals residing in the vicinity of Hartford, Wisconsin, approximately?

A. Why, about \$500,000.00.

Q. Where did the money go for which these mortgages were purchased?

A. It went to the western states.

Q. Practically all of it?

A. Practically.

Q. Have you made any loans particularly during 1922 and 1923?

A. No.

Q. And you had practically that amount of mortgage loans outstanding that you had sold in the course of business, in 1921?

A. Yes, sir.

Q. Were these interest bearing securities?

A. They were.

Q. What was the approximate rate of interest which they drew?

A. 6%.

Examination by Mr. J. C. Russell:

Q. Did you negotiate those loans yourself or did you get them from some Company?

A. From banks and Loan Companies, some from Peters & Co., Minn., and Central Mortgage Company, Minnesota, and Interstate Securities Company, Minnesota.

Q. Does that \$500,000.00 represent what you had outstanding during any one time?

A. That was the entire time.

Q. During the last ten years?

A. Yes.

Q. When did you first start in the business?

A. In 1906.

Q. And you were in the loaning business up to 1921?

A. Yes, sir.

[fol. 129] Examination by Mr. E. W. Sawyer:

Q. On an average, how long did they run before they matured?

A. Usually five years.

Examination by Mr. J. C. Russell:

Q. There are two banks in Hartford, are there not?

A. Yes, sir.

Q. There were three, I think, in 1921?

A. Yes, sir.

Examination by Mr. E. W. Sawyer:

Q. One of those banks has since gone out of business?

A. Yes.

Examination by Mr. J. C. Russell:

Q. What became of it?

A. It was taken over by the First National Bank.

Mr. AUGUST F. WESTPHAL sworn for defendant.

Examination by Mr. J. C. Russell:

Q. Where do you live Mr. Westphal?

A. In Hartford.

Q. Were you a director in the First National Bank in 1921?

A. Yes, sir.

Q. You own stock in the bank?

A. Yes, sir.

Q. What became of that stock?

A. I sold part of it and I have some shares left.

Q. How many shares did you sell?

A. 35.

Q. Who did you sell the stock to?

A. To Mr. Sauerhering.

Q. All of it?

A. No, some to Bruno Jordan.

Q. Did you sell some to Alvin Jordan?

A. I sold it to Bruno Jordan and what he did with it, I don't know.

[fol. 130] Q. When did you sell that stock?

A. Two years ago.

Q. What did you get for that stock?

Objected to.

Objection overruled.

A. I sold some of it for \$225.00 and some for \$250.00.

Examination by Mr. E. W. Sawyer:

Q. Was that subsequent to May 1, 1921?

A. I don't know.

Q. You don't know whether it was before or after?

A. I can't say.

That is all.

Mr. WILLIAM RADTKE sworn for defendant.

Examination by Mr. J. C. Russell:

Q. What official position do you hold in the city of Hartford?

A. City Clerk.

Q. How long have you been city clerk?

A. Six years.

Q. You were City Clerk in 1921?

A. Yes, sir.

Q. Is the Hartford High School a separate taxing unit in the City of Hartford?

Objected to.

Objection overruled.

A. Well, it is, yes.

Q. What was the amount of taxes raised for the Hartford High School in the year 1921?

Objected to.

Objection overruled.

A. Well, I don't know exactly for the High School.

Q. What was the amount of taxes levied for the High School?

A. I haven't it for the High School, but I have it separate for the South Side School?

[fol. 131] Q. Well, about? You gave me those figures at one time, did you not?

A. \$23,000.00 is what they levied. A little over \$23,000.00, \$23,578.00, was the total of the tax.

Q. Is there also a separate taxing unit for District No. 4?

A. Yes.

Q. What does that consist of? What territory is included?

A. The First Ward and the Fourth Ward of the City of Hartford and part of the town of Hartford.

Q. Do you know what was the amount of taxes levied for the city of Hartford for the year 1921?

A. \$7,238.00.

Q. Do you know what the county taxes were?

A. I don't know.

Q. I mean the county tax paid by the City of Hartford?

A. I haven't the exact figures here with me now. The exact figures are here in West Bend in the tax roll.

Q. I will refresh your memory (Showing paper). County tax was \$25,268.51. State taxes, \$9,539.39. Q. Do you recollect the dates that the Board of Review met in the Council Chamber to revise the assessment?

A. In 1921, on July 5.

Q. And continued in session how long?

A. Until July 11.

Q. Inclusive?

A. Yes, sir.

Q. Was it July 11 or July 12? Can you recollect?

A. The books I have home would tell exactly, but I thought it was July 11.

Q. (Showing paper.)

—, I think it should be July 12.

Q. The First National Bank did not appear in any manner to protest any assessment made by the Board of Review?

A. Not in 1921.

Q. Did you post notices in the City of Hartford?

A. Yes, sir.

Q. Where did you post those notices?

A. One on the City Hall Door.

[fol. 132] Examination by Mr. E. W. Sawyer:

Q. You testified to the amount of tax that was levied for the Hartford High School. Were you testifying as to what appeared in the record book before you, or were you testifying or reading from the complaint.

A. Yes, I was reading from the complaint.

Q. You were reading from the complaint in respect to the amount of the county tax?

A. Yes.

Q. Now, do you know whether or not the tax that was levied by the Hartford High School for the city of Hartford for the year 1921, was made by a resolution levying the tax upon the taxable property of the city of Hartford?

A. Do you mean by resolution of the school or Council?

Q. Of the school.

A. That I don't know. I was not at the meeting.

Q. When you received from the High School Clerk a copy of the resolution levying taxes, its resolution provides for the levying of that amount on the taxable property of the city?

A. Yes, sir.

Q. Do you know whether or not this annual High School meeting was before or after May 1?

A. It was after May 1. On the fourth Monday of June, I think.

Q. Have you any time up to date received circular letters from the Wisconsin Tax Commission relating to taxes upon the shares of stock of National Banks?

A. I have not.

Q. Has anything of that kind come to you as City Clerk?

A. No, sir. Not that I recollect.

Q. Have you made any inquiries?

A. No, sir.

That is all.

Mr. E. W. SAWYER sworn for defendant.

Examination by Mr. J. C. Russell:

Q. Are you an officer of the Hartford High School?

A. I am an officer.

Q. What officer?

A. I am Director.

[fol. 133] Q. Were you Director in 1921?

A. Yes, sir.

Q. Did you attend the school meeting?

A. Yes, sir. You mean the annual school meeting?

Q. Yes.

A. Yes, I did.

Q. Did you assist in voting the levying of the tax?

A. I voted for the levy of the tax as a citizen of Hartford, but not in any sense as a stockholder or director of the First National Bank.

Q. But you were a stockholder and director of the First National Bank?

A. Yes, sir, but I didn't attend the school meeting in that capacity.

Q. Was Mr. Andrew Esser there?

A. Yes, I think he was.

Q. He is another stockholder?

A. Yes.

Q. Was Mr. Liever there?

A. I don't know.

Q. Was Mr. Lieven there?

A. My impression is that at the annual meeting that was held on the fourth Monday of June, that Mr. Lieven was there. If I recall, we had an adjourned meeting.

Q. It was a largely attended meeting?

A. Yes, but it was over the election, when I came up for election?

Q. You were elected? Got elected?

A. Yes, I did.

That is all.

Mr. CHARLES FRIDAY sworn for defendant.

Examination by Mr. J. C. Russell:

Q. Are you an official of the Hartford High School, Mr. Friday?

A. Yes, sir.

Q. Were you present at the annual meeting in 1921?

A. Yes, sir.

Q. You know the different stockholders of the First National Bank?

A. A few of them.

[fol. 134] Q. Do you recollect what stockholders were present at that meeting that night?

A. Mr. Sawyer was present, Mr. Lieven and I think Mr. Liever, but I am not positive about it. Mr. Esser was there. We had quite a turnout. Pretty nearly everybody was there that had a right to vote.

Q. Do you recollect any others that were there?

A. No.

Examination by Mr. E. W. Sawyer:

Q. The reason for the size of the meeting was because of the contested election of the Director of that School Board, and there was no contest at that meeting in reference to any tax?

A. No.

Q. Now, Mr. Friday, it is customary in voting a tax at those meetings by resolution, to vote a tax on all the taxable property in the city, or in the school district?

A. Yes, sir.

Mr. JACOB HAHN recalled.

Examination by Mr. J. C. Russell:

Q. I believe you testified, in 1921, that you were the Assessor of the City of Hartford?

A. Yes.

Q. Some time after April 1 and June 1, 1921, did Mr. Liever hand you a statement of the stockholders and number of shares of the First National Bank?

A. I believe he did. I call for it every year. Unless I am mistaken it was the same as last year.

Examination by Mr. E. W. Sawyer:

Q. You are entitled to do that under the law?

A. Yes.

Q. And Mr. Liever is required to give that statement?

A. Yes.

Q. Have you received any circular letters from the Wisconsin Tax Commission in reference to taxing shares of stock in National Banks?

A. Well, last year, this summer here, when I was pretty near done assessing, I got a letter from the Tax Commission.

Q. Did you receive more than one?

A. No, sir.

[fol. 135] Q. Do you remember about the time you received that letter?

A. No, I know I got it when I was pretty near done, but I was done assessing the bank.

Q. What time did you finish assessing the banks, or finish your assessment?

A. The middle of June.

Q. Did that letter that you received contain any provisions in reference to bank taxes?

Objected to.

Objection overruled.

Q. Did the letter that you received have a statement or something in it in reference to what disposition should be made?

A. Yes, sir.

Q. I will ask you to read the last paragraph of that. (Handing paper.)

A. In our opinion the right to tax banks during these two years is so doubtful that a compromise of their taxes on the best basis available is desirable. You will observe that in Circular 786 we suggested payment of not less than 50 per cent of the regular stock tax. Many compromises have been made on this basis and some at a higher rate. For aught that appears in the correspondence, we see no reason why unpaid taxes for the years 1921 and 1922 should not be adjusted on the basis outlined in our circular.

Q. Did you receive a letter containing a provision somewhat similar to that?

A. No, sir.

Q. Didn't you receive Circular No. 786 from the Wisconsin Tax Commission?

A. No, sir.

Q. Do you know where that circular letter is that you received?

A. I burned it up. I cleaned out my desk a couple of weeks ago.

Q. Was there anything in it in reference to settling or compromising with National Banks for the year 1920 and 1921?

A. Nothing.

Q. For 1921 and 1922?

A. No, sir.

Mr. JOHN G. LIEVER recalled for plaintiff.

Examination by Mr. E. W. Sawyer:

[fol. 136] Q. Mr. Liever, have you a stock certificate book from the First National Bank here?

A. Yes, sir.

Q. I will hand you what purports to be such book and ask you if that is such book?

A. That is the book.

Q. The stock certificate book of the First National Bank of Hartford, Wisconsin?

A. Yes, sir.

Q. Does that show when the sales were made of the stock of August F. Westphal, testified to by him?

A. Yes, sir.

Q. When was the first sale made?

A. The first sale of that stock was made March 6, 1922.

Q. To whom?

A. Mr. Sauerhering.

Q. How many shares?

A. 25.

Q. When was the next sale made?

A. On March 8, 1922, four shares to Mr. Jordan. The same day four shares to Mr. Alvin Jordan. In Dec. 6, 1922, five shares to Andrew Esser and five to John A. Becker.

Examination by Mr. J. C. Russell:

Q. Does that include or does that record show the date when the old certificate- were surrendered for cancellation?

A. The same day.

Q. Is that when it was?

A. This shows the date of the transfer of the Westphal stock to the different individuals.

Q. Where are the originals with the assignment on the back, or was there an assignment on the back? The certificate is usually assigned.

A. This is the second stock book. The others were pasted back on the stub. The certificates.

Q. What became of the old certificates that were assigned?

A. There were pasted back on the stub. They were issued from the other book.

Q. You have that book here?

[fol. 137] A. No, I have not. But the original is just like this. It is pasted back on the stub where it is taken off.

Mr. EDWARD RUSSELL, called out of order on plaintiff's main case, sworn for plaintiff.

Examination by Mr. E. W. Sawyer:

Q. Mr. Russell, where do you live?

A. In Hartford.

Q. In what business are you engaged?

A. Well I am in the insurance and loan business.

Q. Have you been in the loan business for at least ten years last past?

A. Yes, sir.

Q. At Hartford?

A. Yes.

Q. Where do the individuals for whom you have loaned money for the last ten years reside?

A. Well in the city of Hartford and surrounding country.

Q. Have you loaned out money from time to time to such individuals on interest bearing securities?

A. Yes.

Q. What was the nature of these loans?

A. Well bonds and mortgages.

Q. And where was the land on which the mortgages were given?

A. North Dakota.

Q. And what was the average rate of time for which these securities ran before they matured?

A. Three to five years.

Q. What was the average rate of interest?

A. Six per cent.

Q. What amount have you loaned out up to the close of 1921 on such securities?

A. Well that is a private affair of mine.

Q. Well I don't care to pry into your private affairs, but I would like to have a fair statement as to the amount of loans that you have [fols. 138-142] made out in the western country.

A. I decline to answer that question.

Q. Well I think that it is proper. What is your particular reason? Was the amount large or small?

A. I decline to answer.

Q. You are a brother of Attorney J. C. Russell in this case?

A. Yes, sir.

Q. You were subpoenaed to attend the trial of this case?

A. Yes, sir.

A. And I spoke to you about testifying before you were subpoenaed?

A. Yes, sir.

Q. You didn't tell me at that time that you would decline to testify?

A. No, sir, I didn't. I asked you what you wanted.

Q. I told you I wanted you to testify to approximately the amount of money you had loaned out?

Court: He need not answer that.

Testimony closed.

(Here follow Defendants' Exhibits Nos. 1, 2, 3, and 4, marked side folio pages 143, 144, 145, and 146.)

[fols. 147-160] COLLOQUY BETWEEN COURT AND COUNSEL

Whereas, a dispute arose as to the following questions and answers, viz:

Mr. Russell: Defendant claims that the 5th question on page 28 of the transcript of the reporter should be "Was it worth \$25,000.00 annually as an asset?" and the answer of Mr. Liver was "I think so."

The defendant further claims that the next question was as follows: "Was it worth \$50,000.00 annually?" and his answer was "I don't know."

The next question was "It was worth somewhere between 25 and \$50,000.00, was it not?" and the answer was "I think so."

Mr. Sawyer: The plaintiff claims that the testimony as transcribed is the correct testimony given pertaining to the matter; that the testimony as transcribed is correct.

By the Court: The court feels that it must be guided by the testimony as certified to by the reporter and is unable at this time to decide which position is correct.

Mr. Russell: The defendant claims that on page 31, question 9, should refer back to the year 1921—"Referring back to the year 1921, do you know what was the book value—" "Referring back to the year 1921, do you know what the book value was on the shares of stock of the First National Bank?" That is what I claim the question was.

Mr. Sawyer: The plaintiff claims that the question pertained to [fol. 161] loan value.

Mr. Russell: Again after the word "Approximately" in the 10th question it should be, the answer should be, "There was no book value established."

Mr. Sawyer: The plaintiff claims that the answer was and pertained to loan values as shown by the answer to the very next question.

By the Court: Put down the same ruling, that the court feels that it must abide by the minutes of the reporter.

I do hereby certify that the above is a correct transcript of the amendments proposed to the bill of exceptions by the defendant's attorney, Mr. Russell, and the rulings of the court thereon and exceptions thereto may be noted.

Dated this 7th day of July, A. D. 1924.

C. M. Davisen, Circuit Judge.

[fols. 162-171] [File endorsements omitted]

IN CIRCUIT COURT OF WASHINGTON COUNTY

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS—Filed in Circuit Court July 10, 1924; in Supreme Court July 12, 1924

Whereas, and because the foregoing exceptions, rulings decisions and other matters do not appear of record, I, the undersigned, the Judge before whom the issues were tried, (has) have on due notice considered and allowed the foregoing as a Bill of Exceptions in said cause and I do hereby certify that said Bill contains all the evidence on the trial and all the exceptions taken and all rulings and decisions made in the said case and all the proceedings had therein.

C. M. Davisen, Circuit Judge.

[fol. 172] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ARGUMENT AND SUBMISSION—Feb. 14, 1925

Stipulated in open court that all objection be waived as to Judges who are interested in bank stock, participating in decision.

And now at this day came the parties herein, by their attorneys, and this cause having been argued by J. C. Russell, Esq., City Attorney, and F. C. Stewart, Esq., and Edward M. Smart, Esq., for the said appellant, and by E. W. Sawyer, Esq., J. Gilbert Hardgrove, Esq., and Leon F. Foley, Esq., for the said respondent, and by Franklin E. Bump, Esq., Assistant Attorney General, for the State of Wisconsin, and submitted, and the Court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fols. 173 & 174] IN SUPREME COURT OF WISCONSIN

[Title omitted]

JUDGMENT—April 7, 1925

This cause came on to be heard on appeal from the judgment of the Circuit Court of Washington County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Washington County, in this cause, be, and the same is hereby, reversed, with costs against the said respondent taxed at the sum of Two Hundred Eighteen and 50/100 (\$218.50) Dollars.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter judgment in favor of the defendant, dismissing the plaintiff's complaint.

Chief Justice Vinje, Justice Eschweiler and Justice Jones dissent.

[fol. 175]

[File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

Appeal from a Judgment of the Circuit Court for Washington County, C. M. Davison, Judge

OPINION—Filed April 7, 1925

Taxation of shares in national banking associations. This action was begun to recover certain moneys paid by the plaintiff under protest to the city of Hartford as taxes levied upon the shares of stock of the plaintiff national bank. Shares of stock in national banking associations are assessed pursuant to section 70.31, Wis. stats. 1921, printed in the margin. See page 1A.

[fol. 176] Section 70.31—Bank Stock, Assessment

(1) The president, cashier or other officer in charge of any bank, shall make out and deliver to the assessor annually on or before the first day of June a verified statement showing the number and par value of the shares of stock, the names and residence of each stockholder therein on the preceding first day of May and the amount of stock owned or held by him on that day.

(2) All the shares of stock of every bank or banking association whether organized under the authority of any law of this state or of any act of the Congress of the United States shall be assessed and taxed in the assessment district in which such bank is located for the transaction of business.

(3) The shares of stock in any bank shall be liable to assessment and taxation as personal property and shall be entered upon the assessment roll in the names of the several owners, separately from the assessment of other personal property assessable to such owners. The valuation of such shares of stock and the taxes thereon shall be separately entered in the tax roll. (Statutes of Wisconsin, 1921.)

[fol. 177] By the provisions of section 70.39, Wis. stats. 1923, any bank is authorized to pay taxes assessed on its shares of stock for its stockholders at its option. The plaintiff bank exercised its option to pay the amount assessed against the owners of its capital stock under protest and brought this action to recover back the amount so paid.

The case was tried before the court and at the conclusion of the trial the judge made and filed the following findings of fact:

"1. That the plaintiff is, and at the times herein stated was, a National banking corporation engaged in the banking business at Hartford, Wisconsin, with a paid up capital stock of Fifty Thousand Dollars (\$50,000) consisting of five hundred (500) shares of the par value of One Hundred Dollars (\$100) and all owned by various stockholders of said bank.

2. That the defendant is a city of the fourth class, operating under the general charter law of this state.

3. That during the year 1921 the taxing officers of the defendant city of Hartford, in form assessed and levied a personal property tax for such year on all of the said shares of stock of the plaintiff bank, at the then prevailing tax rate in the assessment district in which said bank is located, to-wit: at the rate of Three and One Hundred Seventy-seven thousandths Dollars (\$3.177) on each One Hundred Dollars (\$100) of the assessed valuation of such stock, which tax on the whole of said stock amounted to Two Thousand Eight Hundred Fifty-nine and 30/100 Dollars (\$2,859.30). That such taxes were entered upon the tax roll of the defendant city for said year and in due time the tax roll for said year with the taxes so in form against said shares of stock, spread thereon, and the warrant for the collection thereof, were placed in the hands of the city treasurer of said city for the collection of said taxes.

4. That said taxing officers of said defendant city did not make any assessment against, or levy any tax for said year, 1921, upon any moneys or moneyed capital in the hands of any individual citizens of said city, or against any debts due or to become due to such individual citizens or against any interest bearing bonds or against any shares of stock in the hands of any of such citizens, in any corporations except banking corporations, but suffered and permitted the same and the whole thereof to be and remain entirely free from assessment, and exempt from taxation for said year, in accordance with the provisions of subsection 10 of section 70.11 of the Wisconsin statutes.

[fol. 178] 5. That during the year 1921 there was a very large amount of moneyed capital in the hands of individual citizens of said city of Hartford, running into many hundreds of thousands of dollars, that was neither assessed for taxation nor taxed, which entered into competition with the banking business, including the banking business of the plaintiff.

That during said year, 1921, there were vast amounts of moneyed capital in the hands of individual citizens of this state, running into millions of dollars that entered into competition with the banking business, that under the provisions of said section 70.11 subsection 10, were wholly exempted from taxation.

That as a result thereof, the shares of stock of said plaintiff bank as well as the shares of stock of other national banking corporations doing business in this state, were taxed or attempted to be taxed at a much greater rate than other moneyed capital in the hands of individual citizens of said city and state, that entered into competition with the banking business, including the banking business of the plaintiff; and the taxation of said shares of stock in said banks, including the plaintiff bank, and the exemption of said amounts of moneyed capital in the hands of individual citizens entering into competition with the banking business, resulted in an unjust, illegal and discriminating tax against said bank's shares.

6. That on February 28, 1922, and while said tax roll and warrant with said taxes in form against the shares of said plaintiff bank so spread thereon, were in the hands of the treasurer of said city for collection of taxes, the said plaintiff in behalf of its stockholders, as well as in its own behalf and interest, paid said tax under protest to the city treasurer of said city, in the sum of Two Thousand Eight Hundred Fifty-nine and 30/100 Dollars (\$2,859.30). That at the time plaintiff so paid said tax it accompanied the payment with and said city accepted the same, under a written protest then lodged with said city, stating among other things, that said taxes were unjust, discriminatory and illegally exacted in violation of the federal and state constitutions under menace of compulsion and unjust and oppressive penalties, and further stating that the city treasurer to whom the check for such taxes was given, was authorized to cash the same, only, as an alternative to the resort to distress or other means provided by law for the enforcement of unpaid taxes; that said bank claimed the right and would seek all available means for the recovery of such taxes.

7. That on January 27, 1923, the plaintiff in behalf of itself and its said stockholders, filed with the city clerk of said city, its verified claim in writing against said city for the refund and repayment of the amount of said taxes and interest, a copy of which claim is annexed to the complaint herein.

That on the 16th day of February, 1923, the Common Council of said defendant city, upon consideration of said claim, affirmatively disallowed the same."

[fol. 179] And upon the facts so found, concluded that the tax so levied and assessed against the shares of stock of the plaintiff bank

was unauthorized, illegal and void in its inception, in violation of and repugnant to the provisions of section 5219 of the Revised Statutes of the United States; that the tax had not been voluntarily paid and that the plaintiff was entitled to recover judgment against the defendant city as demanded in the complaint. The findings were excepted to and proper findings were requested to sustain the contention of the defendant, which requests were denied by the court, and to the denial of such requests there were proper exceptions. Judgment was thereafter entered in accordance with the findings of fact and conclusions of law in favor of the plaintiff and against the defendant for the sum of \$3,190.84 damages, together with the costs and disbursements taxed at \$113.50, from which judgment the defendant appeals.

[fol. 180] ROSENBERY, J.:

Counsel for the defendant claims that there can be no recovery because there is no showing that the tax levied was in fact inequitable. The contentions of counsel upon this branch of the case fail because if the principal contention made by the plaintiff is sustained, the city of Hartford had no power or jurisdiction to levy an assessment upon the shares of stock of the plaintiff bank and under the provisions of section 74.73 the plaintiff having made payment under protest, it is entitled to maintain an action to recover back any sum paid by it on account of taxes so illegally assessed and levied. It is not claimed that the taxing authorities acted irregularly or in violation of the provisions of the laws of the state of Wisconsin but that there was no authority whatever in the taxing authorities of the city of Hartford to assess and levy the tax in question.

This brings us to a consideration of the principal question raised upon this appeal. This question may be stated in the language of the statute as follows: Are the shares of stock in national banking associations within the state of Wisconsin assessed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state? The solution of this question depends upon the interpretation of section 5219, Revised Statutes of the United States (Act of June 3, 1864, chap. 106; Act of Feb. 10, 1868, chap. 7.) In determining the proper construction and interpretation of that section, some fundamental matters may properly be [fol. 181] adverted to. In the first place, the state of Wisconsin may not tax shares of stock in national banking associations, such associations being instrumentalities of the federal government, except by the consent of the United States. *Adams v. Nashville* (1877), 95 U. S. 19; *Mercantile Bank v. New York* (1887), 121 U. S. 138; *McCulloch v. Maryland* (1819), 4 Wheaton 316.

State taxation of national bank shares was first permitted by act of Congress June 3, 1864 (13 Stats. at Large 99, 112, National Banking Act) subject to the restriction that it should not be

"At a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: Provided, further, that the tax so imposed under the laws of any state upon the shares

of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located." * * *

The act of 1864 was modified and amended by the act of February 10, 1868 (15 Stats. at Large 34) and subsequently became section 5219, Revised Statutes of the United States, and was as follows:

"Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

This section was amended by act of March 4, 1923, chap. 267 (42 Stats. at Large 1499). The facts in this case, however, arose prior to the amendment of March 4, 1923, and it is therefore not [fol. 182] material here except that it is therein provided "that bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business shall not be deemed moneyed capital within the meaning of this section."

The act of 1864 came before the courts almost immediately for construction. See *Van Allen v. The Assessors* (1865), 3 Wallace 573. It also appears from the *Congressional Globe*, Part I, 2nd session, 40th Congress, 1867-68, p. 801, that there was difficulty in applying the authority conferred by the act of 1864 in respect to the place where the shares in national banking associations should be taxed. It was this difficulty that led to the revision in this particular of the act of 1864 by the act of 1868. In this connection, however, it is interesting to note that in *Lionberger v. Rouse* (1869), 9 Wallace 468, the facts in which arose prior to the amendment, it was held that the second limitation in the proviso to the 41st section of the National banking act, which provides that the tax which the section allows the states to impose on the shares held by persons in the said banks, "shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the state where such association is located," referred only to banks of issue created under the laws of the taxing state. For some reason, which is not disclosed, the language last above quoted was dropped from the law

by the amendment of 1868. There appears to have been no discussion of the amendment in that respect.

The purpose of Congress in enacting the statute cannot be more clearly stated than is the language of the Supreme Court of the [fol. 183] United States in *People v. Weaver* (1879), 100 U. S. 539:

"In permitting the States to tax these shares, it was foreseen—the cases we have cited from our former decisions showed too clearly—that the State authorities might be disposed to tax the capital invested in these banks oppressively.

This might have — prevented by fixing a precise limit in amount. But Congress, with due regard to the dignity of the States, and with a desire to interfere only so far as was necessary to protect the banks from anything beyond their equal share of the public burdens, said, you may tax the real estate of the banks as other real estate is taxed, and *you may tax the shares of the bank as the personal property of the owner to the same extent you tax other moneyed capital invested in your State.* It was conceived that by this qualification of the power of taxation equality would be secured and injustice prevented.

That such was the intent of Congress can admit of no doubt. Have they given expression to that intent so that courts can see and enforce it, or have they expressed themselves so unfortunately that the States may, by a narrow interpretation of the act of Congress and by skilfully framed statutes of their own, exercise the power thus granted so as not only to reap its full benefit, but at the same time cause the burden of supporting the State Government to fall with unequal weight on the subject of taxation thus surrendered to it by the national government?"

It is also plain that it was not the intention of Congress by the enactment of section 5219 as amended to prohibit reasonable exemptions or to interfere with the discretion of the legislatures of the various states in granting exemptions as it existed prior to the enactment of the statutes. *Adams v. Nashville* (1877), 95 U. S. 19; *Boyer v. Boyer* (1884), 113 U. S. 689; *Mercantile Bank v. New York*, (1886), 121 U. S. 138.

If section 5219 as amended were presented without interpretation by the Supreme Court of the United States we should have no difficulty in affirming the judgment of the trial court, for the reason that there are many businesses in which "moneyed capital in the hands of individual citizens" is exempt from ad valorem taxation and the income derived therefrom is taxed, which income tax is in [fol. 184] lieu of other taxes. The statute has, however, been interpreted many times and we are as much bound by the interpretation placed upon it by the Supreme Court of the United States as though such interpretation was included within the language of the statute, especially in view of the fact that Congress adopted the language of the court in the amendment of March 4, 1923. This was an express legislative approval of the interpretation of the court. *Camp v. Gress* (1918), 250 U. S. 308, 315; *Heald v. District of Columbia* (1920), 254 U. S. 20.

With the provisions of the federal law in mind, we pass to a consideration of the taxing laws of the state of Wisconsin. From the foundation of the state government down to the enactment of chapter 658 of the Laws of 1911, it had been the policy of the state to levy its general taxes upon property, with the exception of inheritance taxes and license taxes first levied upon railroads and later upon other public service corporations. An amendment to the constitution, authorizing the legislature to impose taxes on incomes, privileges and occupations was approved at the November, 1908 election. The enactment of chapter 658 of the laws of 1911 worked an important and fundamental change in the general taxation policy of the state. See *Income Tax Cases*, 148 Wis. 456, at 503, et seq. for a full history of the matter. In that case, it was said (p. 505):

"By the present law it is quite clear that personal property taxation for all practical purposes becomes a thing of the past. The specific exemptions of all money and credits and the great bulk of stocks and bonds, as well as of all farm machinery, tools, wearing apparel, and household furniture in actual use, regardless of value, goes far to [fol. 185] eliminate taxation of personal property; while the provision that he who pays personal property taxes may have the amount so paid credited on his income tax for the year seems to put an end to any effective taxation of personal property. That taxation of such property has proven a practical failure will be admitted by all who have given any attention to the subject. Doubtless this was one of the main arguments in the legislative mind for the passage of the present act. By this act the legislature has, in substance, declared that the state's system of taxation shall be changed from a system of uniform taxation of property (which so far as personal property is concerned has proven a failure) to a system which shall be a combination of two ideas, namely, taxation of persons progressively, according to ability to pay, and taxation of real property uniformly, according to value."

When the legislature, in the course of revising the tax laws of the state came to the matter of taxation of shares of stock in national banking associations, it was confronted by the fact that section 5219 authorized an ad valorem tax against stockholders on the shares of stock and on the real property owned by the association and nothing else. *Owensboro National Bank v. Owensboro* (1899) 173 U. S. 664; *First National Bank of Albuquerque v. Albright* (1907) 208 U. S. 548. The legislature was therefore compelled to permit capital invested in national bank shares to escape taxation entirely (except upon real estate) or to tax upon an ad valorem basis all moneyed capital in the hands of individual citizens of the state which came into competition with the business of national banks within the rule laid down in *Mercantile Bank v. New York* (1886) 121 U. S. 138. Its only other alternative was to continue on the old ad valorem basis as to taxation of moneys, credits and personal property which had proven a failure.

Desirous of exercising the power conferred upon it to levy an income tax, the legislature undertook to so classify moneyed capital

[fol. 186] as to bring all moneyed capital in competition with moneyed capital invested in the shares of national banks into one class, taxing all such moneyed capital upon an ad valorem basis and levying a tax upon the income derived from other moneyed capital not so in competition. It was therefore provided by section 70.31 heretofore set out in the margin that shares of all banking companies should be taxed on an ad valorem basis. This classification rested upon the fact that prior to 1911, pursuant to an amendment to the constitution of the State, the laws regulating banks and banking had been thoroughly revised. See chapter 94, Laws of 1911; chapters 220, 221, 222, 223 and 224, Laws of 1923. X

Banking was defined as follows (Section 224.02, Wis. stats. 1923):

"The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing, provided that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal." (Wis. stats. 1921 s. 2024, 78-1.)

By the provisions of section 2024-78m, stats. 1911, (sec. 224.03, Wis. stats. 1923) it was made unlawful for any person, copartnership, association or corporation to do a banking business without having been regularly organized and chartered as a national bank, a state bank, a mutual savings bank, or a trust company bank, and a violation of this prohibition was made a misdemeanor. Provisions were created by which any person, firm or corporation theretofore doing a banking business might reorganize as a state bank. Since the [fol. 187] enactment of that law, the banking business of the state has been strictly confined to national banks and corporations organized under the banking laws of the state. The banks, state and national, have a complete monopoly of the banking business and see to it that their privileges in that particular are not infringed upon.

This statute was construed in *MacLaren v. State*, 141 Wis. 577, where it was held that a person or corporation engaged in the business carried on by banks of deposit or of discount or of circulation is doing a banking business, although but one of these functions be exercised. In that case, Gimbel Brothers, operating a large department store, created a deposit purchase department, accepted money on deposit, issued pass books therefor, and charged the purchases of the depositors against the account, interest being paid upon the deposit and the depositor having an option to withdraw the money on demand with interest. This was held to be in violation of the statute.

That the law has been strictly enforced is indicated by reference to the annual report of the Commissioner of Banking for the year 1918, at page 409, where it is shown that industries attempted to organize a department for the encouragement of thrift and accepted deposits from their employees. This was held to be within the pro-

X | hibition of the banking act. State building institutions were organized and the controversy never reached this court. In the state of Wisconsin there is no person, firm or corporation receiving deposits, issuing bills or with power to issue bills, or engaged in the business of discount as carried on by banks except those organized [fol. 188] under the banking law of the state or of the United States, Building and Loan Associations receive deposits of a limited kind and under certain restrictions that do not apply to banks, state or national. See chapters 215, 216, Wis. stats. 1923.

Since 1911, the state of Wisconsin has had the following general system of taxation: (1st) the general property tax, which includes real and personal property other than moneys, credits and intangibles; (2nd) corporation taxes on public utility companies; (3rd) license taxes on the gross earnings of telephone and insurance companies; (4th) income taxes; (5th) inheritance taxes; (6th) occupation taxes on the operation of coal docks and elevators. The income tax act of 1911 exempted the income of state banks, national banks, mutual savings banks, trust companies, mutual loan corporations, building and loan associations and cooperative corporations or associations organized under chapter 185, from payment of an income tax. All other persons, firms and corporations are required to pay such a tax. The shares in all banking associations of the various kinds hereinbefore described were taxable as personal property, under section 70.31 hereinbefore set out in the margin. The classification established by chap. 658, Laws of 1911, stood without challenge for ten years. Is the tax levied pursuant to this law, which has not been substantially changed, discriminatory under the provisions of section 5219, Revised Statutes of the United States?

At this point we may say that in our consideration of the validity of this legislation, we do not consider ourselves concluded as in an ordinary case by the findings of fact made by the trial court, not only because the findings are general in their terms and present [fol. 189] matters which are mixed questions of law and fact, but for the further reason that the law under consideration is one of state wide application. The court is required to take judicial notice of the general conditions to which the law applies. It is either valid in toto or void in toto. Its validity cannot be made dependent upon a particular finding of fact relating to the conditions in a single locality so that, assuming it to be administered as written, the law might be held valid in one place, void in another, or valid at one time and void at another. *State v. Layton*, 160 Mo. 74; *Pittsburgh C. C. St. L. R. Co. v. Hartford City*, 170 Ind. 674; *St. Louis v. Liesing*, 190 Mo. 464; 1 L. R. A. (N. S.) 918; 20 L. R. A. (N. S.) 461. In this respect this case differs materially from some of the cases heretofore decided by the Supreme Court of the United States.

Nor does our conclusion in any manner rest upon the argument that the income tax is an equivalent or substitute for the ad valorem tax levied upon the stock of national banking associations and in that respect we agree with the conclusion of the New York Court of Appeals in *People ex rel. Hanover N. Bank v. Goldfogle*, 234 N. Y. 345, and for the reasons there stated. It is to be noted in this connec-

tion, however, that there are not in Wisconsin as there are in the state of New York, private banking institutions.

We have no difficulty in concluding that there was no "hostile intent," "unfriendly attitude" or "unfriendly discrimination" in the enactment of the laws under and by virtue of which the tax in question was assessed and levied on the part of the state of Wisconsin toward national banking associations. *National Bank of Welling- [fol. 190] ton v. Chapman*, (1898) 173 U. S. 205, 213.

No doubt if the law is clearly discriminatory, hostile intent would follow as a necessary legal inference, but there is no evidence—in fact there is no claim made in this case—that it exists in fact.

As hereinbefore stated, in the absence of prior authoritative construction of the statute, there would seem to be no difficulty in concluding that shares in national banking associations are assessed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state of Wisconsin where such moneyed capital is entirely exempt from ad valorem taxation and pays only a tax upon its income, but the meaning of the phrase "other moneyed capital in the hands of individual citizens" has been limited.

In *Mercantile Bank v. New York*, 121 U. S. 138, the decisions of the court down to that time were cited and fully reviewed. We may well begin our consideration of the ultimate question in the case at bar in the light of the conclusions reached in that case. After reciting the purpose of the act of Congress and the policy involved, it was said (we have here as elsewhere italicized the more material parts):

"It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the States the authority to tax them (national banking associations) within the limits of a rule prescribed by the law. In fixing those limits it became necessary to prohibit the States from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The [fol. 191] business of banking, including all the operations which distinguish it, might be carried on under state laws, either by corporations or private persons, and capital in the form of money might be invested and employed by individual citizens in many single and separate operations forming substantial parts of the business of banking. * * * *The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the Act of Congress is to be read in the light of this policy.*

Applying this rule of construction, we are led, in the first place, to consider the meaning of the words 'other moneyed capital,' as used in the statute. Of course it includes shares in national banks; the use of the word 'other' requires that. If bank shares were not

moneyed capital, the word 'other' in this connection would be without significance. But 'moneyed capital' does not mean all capital the value of which is measured in terms of money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. *Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation, but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling moneyed capital, and its business may not consist in any kind of dealing in money, or commercial representatives of money.*

So far as the policy of the government in reference to national banks is concerned, it is indifferent how the States may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. *Whether property interests in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks.* There is no reason, therefore to suppose that Congress intended, in respect to these matters, to interfere with the power and policy of the States. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. *These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital.'* Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress. That the words of the law must be so limited appears from another consideration; they do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens. *This excludes moneyed capital in the hands [fol. 192] of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands, as in the case of banks.* A railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money, and so may be the owners of moneyed capital; but, as we have already seen, the

shares of stock in such companies held by individuals are not moneyed capital.

The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. *It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment.* In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property." x

In the *Mercantile Bank v. New York* case, it was held that trust companies which had power "to receive moneys in trust and to accumulate the same at an agreed rate of interest; to accept and execute all trusts of every description committed to them by any person or corporation or by any court of record; to receive the title to real or personal estate on trusts created in accordance with the laws of the state and to execute such trusts; to act as agent for corporations in reference to issuing, registering, and transferring certificates of stock and bonds, and other evidences of debt; to accept and execute trusts for married women in respect to their separate property; and to act as guardian for the estates of infants," were not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce; that while it is true they receive money on deposit, invest it in [fol. 193] loans, and so deal in money and securities for money in such a way as properly to bring the shares of stock held by individuals therein the definition of "moneyed capital in the hands of individuals," as used in the act of Congress, that nevertheless there was no discrimination where trust companies were taxed as other corporations upon the actual value of their capital stock.

In the same case it was held that although savings banks deposits to the amount of over \$400,000,000, were exempt from taxation and that these deposits constitute moneyed capital in the hands of individuals within the meaning of the statute, yet the Court held that it was "clear that they are not within the meaning of the act of Congress in such sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation," for, said the Court: "No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States. * * * However large, therefore may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the

taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation."

In *Davenport Bank v. Davenport* (1887), 123 U. S. 83, it appeared that a statute of the state of Iowa taxed savings banks on the amount of their paid-up capital but did not tax the shares of savings banks held by individual shareholders and it was claimed that the capital of savings banks could only be taxed by the state by an assessment upon the shares of that capital held by individuals because under the act of Congress the capital of national banks could only be taxed in that way. The court said:

[fol. 194] "It has never been held by this court that the States should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners. *All that has ever been held to be necessary is, that the system of state taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks.*"

In the *Davenport* case, the court held that a tax imposed upon the savings bank was in fact equal to that imposed upon the shares of national banks. The doctrine of the *Davenport* case was affirmed in *Bank of Redemption v. Boston* (1887), 125 U. S. 60. In this case it was claimed that the tax levied upon national banks compared with the tax levied upon savings banks, pursuant to the laws of the state of Massachusetts, was discriminatory. The court said:

"It is alleged that in Massachusetts savings banks are permitted to transact a banking business in the way of loans upon personal securities, which assimilates them more closely to national banks, and takes away the reason for the application of the rule to them which was applied to the case of the savings banks of New York. But the difference mentioned, if it exists at all, is immaterial; the main purpose of chief object of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the *Mercantile Bank*. They are substantially institutions, under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase. We adhere to the rule as declared in the cases heretofore decided, which forecloses further discussion as to the present point in this case."

It was also urged that the tax was discriminatory when compared with the taxation upon insurance companies, trust companies, American Bell Telephone Company and the Massachusetts Hospital Life Insurance Company. This objection was held untenable and it was said that the interest of individuals in these institutions is not

[fol. 195] moneyed capital within the meaning of that term as established in the Mercantile National Bank case and that the investments made by the institutions themselves constituting their assets are not moneyed capital in the hands of individual citizens of the state, citing *People v. Commissioners*, 4 Wallace 244.

In *Talbott v. Silver Bow County*, (1890), 139 U. S. 438, 448, in commenting upon section 5219, the court said:

"Obviously by this section, as interpreted by the decisions of this court, the limitation applies solely to a parallel with the individual or corporation whose capital in money is used with a view of compensation for the use of the money. And that is the only restriction which, under the agreed statement of facts, demands any consideration. The tax upon a corporation whose capital is invested in manufacturing or transportation cannot, under this section, be placed in comparison with the tax upon an institution whose business is profit on money as money."

In *Aberdeen Bank v. Chehalis County* (1896), 166 U. S. 440, it was claimed that money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments and investments in mortgages, came into competition with the business of national banks as other moneyed capital in the hands of individual citizens of the state of Washington. This contention was overruled, the cases were reviewed and substantially that part of the opinion in the Mercantile National Bank case which has been hereinbefore set out was quoted and the court said:

"The conclusions to be deduced from these decisions are that money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments and investments in mortgages, does not come into competition with the business of national banks, and is not therefore within the meaning of the act of Congress; that such stocks as those in insurance companies may be legitimately taxed on income instead of on value, because such companies are not competitors for business [fol. 196] with national banks; and that exemptions however large, of deposits in savings banks, or of moneys belonging to charitable institutions, *if exempted for reasons of public policy and not as unfriendly discrimination against investments in national bank shares, should not be regarded as forbidden by Section 5219 of the Revised Statutes of the United States.*"

It appears that there was taxable moneyed capital in Chehalis county which escaped taxation, amounting to \$237,400; that there was unassessed moneyed capital in other portions of the state exceeding \$14,000,000; that the moneyed capital invested in banks, national and state, was \$11,000,000; and that there was invested in the stocks and bonds of insurance, wharf and gas companies and other moneyed institutions, moneyed capital amounting to at least \$26,000,000. The court said:

"As to the sum of \$237,400, alleged to be invested by individual citizens of Chehalis County in loans and securities to them payable and owing by other citizens of that county, we are not informed by the bill of the nature of such loans and securities, and, as against the pleader, *we may well assume that they belong to a class of investments which does not compete with the business of national banks.* The same is true of the sum of \$14,000,000 alleged to be invested in loans and securities by citizens of the State of Washington and to them payable and owing by other citizens of said State."

This case turns upon the proposition that it did not appear from the allegations of the bill that the moneyed capital was in competition with shares in national banking associations. However, the nature of the loans was disclosed, that is, they were made by citizens of the state to other citizens of the state, from which the conclusion follows that loans made by the citizens of a state to other citizens do not, unless they possess some other quality, compete with the business of national banks.

[fol. 197] In *National Bank of Wellington v. Chapman* (1898), 173 U. S. 205, it was held that the system of taxation adopted in Ohio was not intended to be unfriendly to, or discriminate against owners of shares in national banks and it was again held that the term "moneyed capital" did not include capital which does not come into competition with the business of national banks. Both the *Mercantile National Bank* case and the *Aberdeen Bank* case were cited with approval.

In *Amoskeag Savings Bank v. Purdy* (1913), 231 U. S. 373, the whole matter of the validity of the New York plan of taxing national bank shares was again under consideration by the Supreme Court of the United States. Again the opinion in the *Mercantile National Bank* case was quoted at length, prior cases referred to and the court said:

"According to this practical test, it seems to us that the scheme adopted by the State of New York for taxing shares in national banks cannot upon this record be denounced as violative of the limitations prescribed by section 5219, Rev. Stats. The holders of shares in state banks are subjected to precisely the same taxation, and with respect to other competitive institutions, such as trust companies, the franchise taxes imposed upon them apparently result in a substantially similar burden upon the shareholder. Nor is there any discrimination in favor of savings banks. With respect to individual bankers, there is a difference, they being apparently subject to the local rate of taxation and entitled to the privilege of deduction for personal debts; but as they are taxable upon the amount of the capital invested in the banking business, which is normally only such as remains after the deduction of debts, it is not plain that they possess any valuable privilege of reducing the tax assessment by deducting debts. * * * If there be other forms of 'moneyed capital in the hands of individual citizens' of the State employed in a banking or quasi-banking business in competition with the national banks,

and which are subjected to a more favorable rule of taxation, our attention is not called to them. *Moreover, we agree with what was said by the Court of Appeals of New York in the Feitner Case, 191 N. Y. 88, 96, that 'The State is not obliged to apply the same system to the taxation of national banks that it uses in the taxation of other property, provided no injustice, inequality or unfriendly discrimination is inflicted upon them.'*"

[fol. 198] In *Merchants National Bank v. Richmond* (1920), 256 U. S. 635, section 5219 Revised Statutes was again before the Supreme Court of the United States for consideration. In that case it appears that the tax was imposed pursuant to an ordinance of the city of Richmond, approved April 9, 1915, and it was claimed that that ordinance was repugnant to the provisions of section 5219, Revised Statutes. This ordinance taken in connection with the general law of the state authorized the imposition for the year 1915 upon bank stocks, state and national, of a tax for state purposes at the rate of 35 cents, a tax for city purposes at the rate of \$1.40, a total of \$1.75 upon the \$100 of valuation, while upon intangible personal property in general, including bonds, notes, and other evidences of indebtedness, the state rate was 65 cents, the city rate 30 cents, an aggregate of 95 cents upon each \$100 of valuation. It further appeared without dispute that moneyed capital in the hands of individuals invested in bonds, notes and other evidences of indebtedness came into competition with national banks in the loan market. It appears that in the city of Richmond in 1925, city and state taxes at the rates first mentioned were imposed on national bank stocks to the aggregate value of more than \$8,000,000 and stocks of state banks and trust companies to the aggregate value of \$6,000,000, and upwards, while taxes at the lower aggregate rate of 95 cents per \$100—city tax 30 cents, state tax 65 cents—were imposed for the same year upon bonds, notes, and other evidences of indebtedness aggregating \$6,250,000 in value. The Court cited the *Mercantile Bank case*, the *Amoskeag Savings Bank case*, and *Evansville Bank v. Britton* (1881), 105 U. S. 322, and referring [fol. 199] to the rule heretofore quoted from the *Mercantile Bank case*, the court said:

"No decision of this court to which our attention is called has qualified that rule, or construed section 5219 as leaving out of consideration the rate of state taxation imposed upon moneyed capital in the hands of individual citizens invested in loans or securities for the payment of money, either for permanent or temporary purposes, where such moneyed capital comes into competition with that of the national banks. * * * In the present case, there is a clear showing of such competition, relatively material in amount, and it follows that, upon the undisputed facts, the ordinance and statute under which the stock of plaintiff in error was assessed, as construed and applied, exceeded the limitation prescribed by section 5219, Rev. Stats., and hence that the tax is invalid."

There is nothing in the published report to indicate whether the bonds, notes and other evidences of indebtedness aggregating \$6,250,000, are held by private banks or other persons. We find nothing in the laws of the state of Virginia which restricts the business of banking to corporations organized under the laws of that state or of the United States and it is asserted in the briefs of counsel that there are in fact a number of private banking institutions within the city of Richmond. Nor is there anything in the published report to indicate definitely what is meant by competition. If the rule laid down in the Aberdeen Bank case is adhered to, it must mean something more than the mere fact that citizens of the state are loaning to each other, for there the allegation of the bill was that \$14,000,000 was invested in loans and securities by the citizens of the state of Washington and to them payable and owing by other citizens of said state. The case was even stronger, in *Bank of Commerce v. Seattle*, (1896), 166 U. S. 463, where the allegation held insufficient to show competition was as follows:

"All of said other moneyed capital referred to was all the moneyed capital in the city owned by resident individual citizens and invested in interest-bearing loans, discounts and securities, except that invested in incorporated banks, located in the city."

[fol. 200] The word "competition" does not appear in section 5219. While the word was not used, the idea was first introduced into the decisions of the court in *People v. Commissioners*, 4 Wallace 244. The dominant idea of Congress in permitting taxation of national banks was that the right of the states should be so restricted that national banks should not be handicapped by the states. *Congressional Globe*, Part 2, 1st sess. 38th Congress, p. 1873. The word first appeared in this connection in *Mercantile National Bank v. New York*, 121 U. S. 138, at 155, where it is said:

"The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly *competition*, by favoring institutions or individuals carrying on a similar business and operations and investigations of a like character. The language of the act of Congress is to be read in the light of this policy."

The meaning of the words "moneyed capital" was drawn into question in the House when it had under consideration the amendment of the section in 1868. The Chairman of the Committee on Banking and Currency said:

"My own impression is that they (referring to the words 'moneyed capital') mean capital invested in similar interests,—bank shares of state institutions as they originally existed." *Congressional Globe*, Part 1, 2nd sess. 40th Congress, 1867-68, p. 803.

The word "competition" has no definition which is inclusive as well as exclusive. (12 C. J. 236 and cases cited.) As ordinarily used, it is

opposed in meaning to monopoly. It involves the idea of struggle between rivals endeavoring to obtain the same thing. As the word is used in the decisions referred to it undoubtedly means that if there is any material amount of moneyed capital engaged in a business which bids against national banks for the business which they are authorized to do, competition exists. *Mercantile National Bank of [fol. 201] of Cleveland v. Shields*, 59 Fed. 952; *First National Bank of Richmond v. Turner*, 154 Indiana 456; *First National Bank of Nephi v. Christensen*, 39 Utah 568.

Therefore, as has been pointed out, shares of stock in railroad companies, mining companies, manufacturing companies, savings banks, building and loan associations, and other corporations although represented by certificate showing that the owner is entitled to an interest expressed in money value, nevertheless these cannot be said to be in competition with moneyed capital invested in national bank shares. 3rd Cooley on Taxation, 4th ed., par. 999 and cases cited.

The testimony upon which the trial court concluded that there was moneyed capital in the hands of individual citizens in Wisconsin, which came into competition with national banks, related principally to loaning concerns and individuals loaning their own funds and may be summarized as follows: Loaning concerns compete with the business of national banks because they withdraw funds from the banks which they use in making their loans. Persons who purchase mortgages, notes and bonds at times withdraw funds from the banks for that purpose. In order to establish a national bank, it is necessary to sell its stock. Somebody has to furnish the money to buy the stock. There is competition therefore in two ways,—competition for capital and competition for money which would ordinarily be on deposit with the bank. If [fol. 202] people, who have funds to invest, invest it in securities other than bank stock, the bank would be hard pressed to obtain capital on which to operate and in that sense they are in competition for capital. We give the language of one witness:

"There is a competition for business between national banks and bonding companies or individuals engaged in selling bonds. That competition might arise in several ways. It might arise directly in that national banks are authorized to buy and sell securities or competition would arise in the money which the two institutions would lend. Investment houses dealing in all kinds of securities would come into competition with such loans, especially in short time loans. The money that is awaiting investment is largely held by individuals and a large part of it on deposit in national banks. When that money is invested it is withdrawn from the banks by the depositor to pay the vendor of the bond."

Upon this testimony rests the conclusion of the trial court that there was competition in fact, but this is no more than the competition which exists when manufacturing and commercial corporations seek capital either for the organization of their business or to aid them in carrying it on after its organization. As has been pointed out, competition of this kind has been repeatedly held not to

be competition within the meaning of that term as used in the construction of section 5219. Investors wishing to purchase dry goods, automobiles, et cetera, withdraw money from banks, but that does not amount to competition in fact. There are no concerns or individuals within the state of Wisconsin, engaged in enterprises in which the capital employed in carrying on its business, is money "where the object of the business is the making of profit by its use as money" except banks. All such persons, firms and corporations are required under the laws of the state of Wisconsin to organize as banks. In this respect, the situation in Wisconsin by reason of its banking laws, is radically different from those in most states, [fol. 203] and one so far as we are able to discover not heretofore dealt with. *Minnehaha Nat'l Bank v. Anderson*, 2 (2d) Fed. Repts. 897, does not deal with this situation.

We now come to a consideration of moneyed capital within the state of Wisconsin, which is said to be in competition with the shares of national banking associations within the meaning of section 5219.

Building and Loan Associations

In *Mercantile Nat'l Bank of Cleveland v. Hubbard* (1899) 98 Fed. 465, the court said:

"It seems to me that building associations are certainly not to be differentiated in their purpose or object, or practical effect, from savings banks, and that capital invested in them, though subject to a somewhat different rule of taxation cannot be regarded as moneyed capital in competition with the moneyed capital in national banks, any more than is capital invested in savings banks. The chief object of building associations is to encourage the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construction of the house."

While this case was reversed on appeal (105 Fed. 809), the reversal was upon an entirely different point. See also *Consolidated Nat'l Bank v. Pima*, 48 Pac. 291; *First Nat'l Bank v. Dawson*, 213 Pac. 1097; *People v. Goldfogle*, 205 N. Y. Sup. 870.

Brokers and Dealers in Bonds, Mortgages, and Securities

These are not in competition with national banks because national banks are not by law authorized to carry on the business of trafficking or dealing in mortgages, bonds or securities. While they may buy and sell mortgages, bonds and securities as an incident to their [fol. 204] principle business, they are not in any proper sense of the term dealers in such securities. *People v. Goldfogle*, 205 N. Y. Sup. 870; *Morse on Banks & Banking*, 5th ed. vol. 1, secs. 59, 71, 77; *Nat'l Bank vs. Mayor of Baltimore*, 100 Fed. 24 (C. C. A.); *Corn Exchange Bank v. Kaiser* 160 Wis. 199; *Grand Forks Bank v. Anderson*, 172 U. S. 573.

In *Talbott v. Silver Bow County*, 139 U. S. 438, the court said:

"Obviously by this section (sec. 5219) as interpreted by the decisions of this court, the limitation applies solely to a parallel with the individual or corporation whose capital in money is used with a view of compensation for the use of the money." See also *Palmer v. McMahon*, 133 U. S. 660.

In *Minnehaha Nat'l Bank v. Anderson*, 2 (2d) Fed. Repts. 897, the restricted power of national banks to act as brokers is wholly ignored. National banks do not use their capital as a "rotating fund" in the purchase and sale of securities.

Dealers in bonds, mortgages and securities do not derive their profit except in a slight degree from accruing interest. Their objective is a profit by resale at an advanced price. They are merchandisers of securities and not bankers in any proper acceptation of that term. They are not in Wisconsin permitted to use the words "bank", "savings bank", "banker", or the plural thereof upon any office sign or on any letter head or other written or printed matter. Section 221.49, Wis. stats.

Acceptance Companies

The business conducted by these companies, at least in this state, is of comparatively recent origin. Dealers in automobiles, motor trucks, motorcycles, vacuum cleaners, electric washing machines, pianos, talking machines and other articles make sales on the install-[fol. 205] ment plan, taking notes or so-called acceptances in the nature of conditional sales contracts. Acceptance companies buy these contracts and in the transaction of their business are usually heavy borrowers from the banks. Their business more nearly corresponds to that of a pawnbroker or a chattel mortgage broker than of a bank.

In *People v. Goldfogle*, 205 N. Y. Sup. 870, the court said:

"Bankers' Commercial Securities Co., Inc., purchases from dealers, who buy from manufacturers, condition sale contracts, leases, and chattel mortgages on automatic piano players, calling for weekly or monthly installments over an average period of 30 months; the payments average about \$12.50 a month on each transaction. This is not the acquisition of evidences of indebtedness, which 'normally enter into the business of banking.'" Citing *Merchants Nat'l Bank v. Richmond*, 256 U. S. 635, 639.

The very fact that these companies have come into existence to meet a situation created by the increasing amount of sales made upon conditional sales contracts not acceptable to banks is indicative of the fact that they are doing a business not in competition with that done by banks. There is a wide gap between securities of this character and the ordinary commercial paper accepted by banks in the usual course of their business.

Dealers in Foreign Exchange

Inasmuch as the only showing of competition in this field is that done by the express companies, which are under the laws of the state a public utility and therefore assessable on an ad valorem basis, we shall not further consider this subject, it not being made to appear in any way that the moneyed capital invested in these companies is assessed at a lower rate than the shares in national banking associations are assessed.

[fol. 206] Investments of Individuals in Bonds, Mortgages, and Securities

It appears from the evidence and is a fact known to everyone that in the state of Wisconsin there are many individuals who loan their own money upon real estate mortgages, bonds and other interest bearing securities in lieu of depositing the same in banks or investing in stocks or other forms of investment. Investments thus made by individuals can at best come into competition with the business done by national banks only in a limited and remote way. Banks deal principally in commercial paper and can take real estate loans of but a very limited class. By section 24 of the federal reserve act, national banks are authorized to make loans within a radius of one hundred miles upon farms, for not more than five years; upon other real estate for not more than one year, at not exceeding fifty per cent of the actual value of the property offered as security, the aggregate of which loans cannot exceed twenty-five per cent of the capital and surplus or one-third of the time deposits of the bank, whichever is greater. No person can accept deposits or do anything approaching a banking business under the law of this state. Loans made by individuals upon real estate or investments made by them in bonds, are in no practical way, to any extent, in competition with the business of national banks. Individual investors handle a very large class of loans which national banks are by law forbidden to deal in.

In the Mercantile Nat'l Bank case, it was held that investment in municipal securities are not in competition with national banking associations. The court said:

[fol. 207] "Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily the subjects of taxation they are not within the reason of the rule established by congress for the taxation of national bank shares."

We cannot believe that these incidental investments made from the savings of individual citizens come within the term "moneyed capital" in competition with similar capital invested in the shares of national banking associations however large in the aggregate amount they may be. While they more closely approximate competitive moneyed capital than any other form of moneyed capital in this state, they are not made as a business but simply as one form of investment. If a deposit in a savings bank is not competitive

moneyed capital, how does it become competitive when it is drawn out and invested in a mortgage? This situation was, however, presented and ruled upon in the Bank of Aberdeen case, where it appeared that there were millions of dollars loaned by citizens in the state to other citizens upon notes, bonds and mortgages, but that fact was held not to be sufficient to show competition. No more is shown in this case. In that case as here the money was no doubt withdrawn from banks for the purpose of investment and after its investment no doubt found its way immediately back into the banks. Transactions of that sort are not employing moneyed capital in a business nor is it the kind of competition which must result in the classification of capital thus held with moneyed capital invested in national bank shares. Such inequality as may exist under our taxing law is accidental and not an intentional or a systematic discrimination. *First Nat'l Bank v. Albright*, 208 U. S. 548, 552.

[fol. 208] Our conclusion in this respect is strengthened by the language of the act of March 4, 1923. It is there provided that "bonds, notes or other evidence of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

If the investments of individuals made not as a business but for the purpose of investing their own funds are held to be competitive within the meaning of section 5219 before the amendment, they must fall in the same category thereafter, for by the amendment they must "not be made in competition with such business." Without attempting to define what is meant by competition, the word was no doubt used by Congress in the act of 1923 in the same sense in which it was used in the *Mercantile National Bank* case and *Merchants Nat'l Bank v. Richmond* case. Congress must have meant to do something by the amendment. If the term "competition" is defined as plaintiff's claim it should be, the amendment would be futile as applied to the situation existing in this state.

It is considered upon the whole case therefore that the tax assessed and levied was a legal tax and that the law of the state of Wisconsin authorizing it is a valid law and within the consent conferred by section 5219, revised Statutes of the United States, upon the State of Wisconsin, for the following reasons:

(a) There is in fact no unfriendly discrimination or hostile attitude on the part of the state of Wisconsin toward national banks.

(b) The law is not in fact discriminatory, does not in fact operate oppressively or harmfully, as is shown by the fact that national banks are prosperous.

(c) All persons, firms and corporations doing a banking business [fol. 209] are required to organize as banks and so become taxable as national banks are taxed. There is no business conducted within

the state which is in direct competition with national banks not taxed as national banks are taxed.

(d) Moneyed capital in the hands of individual citizens, invested in mortgages and securities for their own personal benefit, does not in fact compete as a business with moneyed capital invested in shares of national banks for the business which national banks are authorized to do. If there is any competition as to loans, such competition is within such a narrow and restricted field and so inconsequential in amount as not to be in fact discriminatory within the decisions already cited.

(e) The *Mercantile Nat'l Bank v. New York* case, *supra*, is not overruled or modified by *Merchants Nat'l Bank v. Richmond*, *supra*, but is reaffirmed by it so far as the construction of section 5219 is concerned. The fact that moneyed capital in the hands of individual citizens came in competition with national banks was established in that case without dispute and the rule laid down in *Mercantile Nat'l Bank v. New York* case was applied. That fact does not appear in this case.

(f) There is no moneyed capital in the hands of individual citizens of Wisconsin bidding for the business which national banks are authorized to do. Such restricted and incidental competition as there is is insignificant in amount and works no "discrimination unfavorable to the holders of shares of the national banks."

[fols. 210 & 211] By the COURT: Judgment appealed from is reversed and cause remanded with directions to the trial court to enter judgment in favor of the defendant, dismissing the plaintiff's complaint.

The following Justices dissent: Chief Justice Vinje, Justice Eschweiler, Justice Jones.

[fol. 212]

[File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

DISSENTING OPINION—Filed April 13, 1925

VINJE, C. J., dissenting:

The court states that the crucial question raised upon this appeal is as follows: "Are the shares of stock in National Bank Associations within the state of Wisconsin assessed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state?" This seems to me to be a misconception of the principal question in the case for it is a conceded fact that the bank stock in question was assessed at over three per cent while

had it been assessed as other moneyed capital in the hands of private individuals of the state, namely, upon an income basis or an equivalent thereof the assessment would have been less than one per cent. Indeed, it was frankly conceded upon the oral argument by the state, as intervener, and by the city of Hartford that the bank stock was assessed at a much higher rate than was moneyed capital in the hands of private individuals of the state and that the rate was discriminatory if it came within the prohibition of the statute as construed by the federal Supreme Court. The justification sought [fol. 213] upon the argument, and the justification sought by the opinion of the court, is that there is in the state of Wisconsin outside of state banks and trust companies, which are assessed at the same rate as national banks, no moneyed capital in the hands of private individuals that comes in competition with the business of national banks. This is the basic ground for the conclusion reached by the court. Further on in the opinion it is stated "There are no concerns or individuals within the state of Wisconsin engaged in enterprizes in which the capital employed in carrying out the business is money 'where the object of the business is the making of profit by its use as money' except banks." It seems to me that trust companies might well have been included in the exception in as much as they are taxed the same as banks, and perform to a large extent the function of banks, and, for my purpose I shall assume that trust companies were intended to be included in the exception. My difficulty comes not so much in construing the federal decisions as the court construes them but in arriving at the conclusion upon the evidence in this case, and upon what may be taken judicial notice of, that there is no moneyed capital in the hands of private individuals in the state of Wisconsin that comes in competition with the business of national banks. The undisputed evidence in the case shows that there is such competition so far as the plaintiff bank is concerned. The taxing officer and the state introduced no evidence to rebut that which the bank offered, so that the testimony in the case is undisputed except in so far as it may be in conflict with facts of which the court may take judicial notice. Mr. Liver, the president of the bank, who had been such for seventeen years [fol. 214] past testified among other things that there were four business concerns in the city of Hartford engaged in the loaning business and that he knew that these four concerns had loaned out about \$250,000 or \$300,000 a year and that such facts were true as to the year 1921. He further testified that these loaning concerns "compete with the business of the bank in that respect the same as other banks would be in competition." He further states in answer to a question as to whether the same conditions obtain generally throughout the state, that, judging from his experience and connection with five groups of Wisconsin bankers' associations "the situation is the same. The amounts in some localities are very large of course. The effect is the same all over. I am familiar with the banking business and I have attended a great many bankers' conventions. I know the Ziegler Company. Its home office is at West Bend. It is engaged in the real estate and loan business. It does

a large amount of business in this city. It has an agency at Hartford. They circularize their loans and solicit in many ways. I know of large loans they have made that run up into thousands of dollars and the situation I testified to competed with the business of the First National Bank applied in 1921 as well as it does at the present time. There is no change in the situation." I agree with the statement of the court that it "is required to take judicial notice of the general conditions to which the law applies. It is either valid in toto or void in toto. Its invalidity cannot be made dependent upon a particular finding of fact relating to the conditions in a single locality. So that assuming it to be administered as written the law might be held valid in one place and void in another or valid at one time and void at another." The difficulty I have is in disregarding the testimony in the case as applied to the particular locality of Hartford, a city containing a little more than four thousand inhabitants, and in coming to the conclusion that the testimony given with reference to the conditions in that locality do not obtain in other cities in the state containing an equal or larger population. It seems to me that the uncontradicted testimony of the president of the plaintiff bank that there are a number of loan companies in the city of Hartford that come in direct competition with the loaning business of the First National Bank is in accordance with facts generally known to exist in the banking and loaning business and that it is quite probable as he says, that the condition existing in his locality obtains throughout the state. Indeed, it may be safely said that in larger cities the amount of money loaned by loaning companies in all probability exceeds the amount per capita in the smaller cities. We have one city containing nearly one half million inhabitants in which there is an immense amount of wealth and in which a large number of loaning companies are doing a profitable business. We have in the state of Wisconsin and did have in 1921 over fifty cities containing a population of more than four thousand people each and in the aggregate a population exceeding one million and a quarter. If we take this condition into account and assume that an equal amount of money is loaned in these urban localities, omitting altogether suburban and agricultural districts, we find that over ninety million dollars in loans would be made in these urban localities [fol. 216] throughout the year. Inasmuch as it is a fact that in the state of Wisconsin at least seventy five per cent of the net income of National Banks is obtained from loans it seems natural to conclude that the vast amount of loans made by these loaning companies comes in sharp competition with the main gainful business of national banks in this state. The conclusion reached by the court is that outside of state banks and trust companies there is no moneyed capital in the hands of private individuals that comes into competition with the business of national banks. It is conceded that there must be a substantial competition to some substantial part of the bank's business; that the federal statute was not intended to make a law invalid where it merely in some minor degree in a minor way may be discriminatory. It is also conceded that the law

be construed, prior to its amendment by Congress in 1923, as it was then amended, namely, that this competition must come through some regular permanent business channel and not through individual loans made by individual citizens for their own benefit only, although from some expressions in the decision of the Supreme Court of the United States it may be doubtful that the act prior to its amendment should be so construed. As I interpret the situation the court has come to the conclusion that there is no moneyed capital in the hands of private individuals in this state that comes in substantial competition with a substantial part of a national bank's business because in a number of federal cases the evidence showed that as to a particular locality a particular class of moneyed capital in the hands of private individuals was found not to come in competition with the business of a national bank. It is one thing to say that as to a particular locality this class or that class or several classes of moneyed capital in the hands of private individuals [fol. 217] did not come into competition with a national bank situated in that locality. It is quite another thing to come to the conclusion that national banks in the state of Wisconsin have no competition from all classes of moneyed capital in the hands of private individuals within the whole state. Herein lies my disagreement with the result of the court. We all, I think, construe the federal decisions alike. But I am unable to reach the conclusion that under the federal decisions the evidence in this case together with the facts of which we may take judicial notice can sustain the conclusion that there is no competitive moneyed capital in the hands of private individuals in the state of Wisconsin.

It seems to me quite plain that Congress when using the term "other moneyed capital in the hands of private individuals" meant something besides money in state or private banks or trust companies. If those were the only classes of capital Congress had reference to it would have been easy to have so stated in the law especially in the amendment of 1923. But we find there the identical phraseology retained and it seems to me that from that fact it cannot be said that Congress was of the view that in any one state such as Wisconsin no other moneyed capital in the hands of private individuals could or did come in competition with national banks except state banks, trust companies or private banks. I cannot escape the conclusion that by using the phrase "other moneyed capital in the hands of private individuals" it was intended to include all forms of moneyed capital where money as such was used as capital for the purpose of making a gain or profit, and that whenever a business of that kind conducted by an individual or by a partnership or otherwise came in direct competition with a substantial part of the business of a national bank it was included in the condemnation of the statute. Where, as here, our law taxes loaning companies less than one-third of what it taxes national banks for doing the same kind of business it seems to me that it must be said that the law is discriminatory and comes within the condemnation of the federal statute. It is idle to say that national banks have prospered in the past under our system of taxation. That

is not the question. The question is, does our system of taxation operate to discriminate against national banks as compared with other moneyed capital engaged in the same or like business? Of course it goes without saying that private individuals in our state cannot engage in all the kinds of business that a national bank engages in, because private individuals in our state cannot do a private banking business without being organized as state banks and thus coming within the same class as to taxation. But as was said in the *Mercantile Bank v. New York*, 121 U. S. 139, a part of the legitimate business of a national bank is "the discounting of commercial paper, making loans of money on collateral security and negotiating loans dealing in bonds, etc." Now it is a well known fact that in our state there are numerous private individuals and partnerships and corporations that can and do engage in this class of business just mentioned which is a part of the business of a national bank and the money invested in such enterprises runs into the millions of dollars and the business transacted by them runs into the hundreds of millions of dollars annually.

[fol. 219] The crux in this case is whether or not there is moneyed capital in the hands of private individuals of this state that comes in competition with the business of national banks or any substantial part thereof within the meaning of the federal statute as construed by the Supreme Court of the United States. The case of *Merchants National Bank v. Richmond*, 256 U. S. 635 is the latest expression we have upon this question from the federal Supreme Court. In that case it was found that there was money to the extent of upwards of twenty million dollars coming into competition with the business of national banks and as the court said "By repeated decisions of this court dealing with the restrictions here imposed it has become established that while the word 'moneyed capital in the hands of individual citizens' do not include shares of stock in corporations that do not enter into competition with the national banks, they do include something besides shares in bank corporations and others that enter into direct competition with those banks. They include not only money invested in private banking properly so called but investments of individuals in securities that represent money at interest and other evidence of indebtedness such as normally enter into the business of banking." And further on it is said that this "moneyed capital" "included money in the hands of individuals employed in a similar way invested in loans or in securities for the payment of money either as an investment of a permanent character or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is generally known as personal property." It would seem [fol. 220-224] to be clear from this expression of opinion that it was the idea of the federal Supreme Court that the competitive moneyed capital spoken of in the statute was not limited to the competitive moneyed capital of a bank or even of a trust company but that it might be competitive though in the hands of private

individuals and though doing only a part of the business which the business of a national bank transacts.

My conclusion is that not only does the undisputed testimony show that there was moneyed capital in the hands of private individuals in large amounts coming in direct competition with the loaning business of the plaintiff bank but that in my judgment taking into account the business of national banks within the state as transacted and the business of loaning and bonding companies and other private businesses in which money is used as capital for the purpose of making a profit thereon, that it can be said that there are hundreds of millions of dollars in this state that come in direct competition with some form of the business transacted by national banks and therefore it is contrary to the federal statute to tax the national banks over three times as much as these other private businesses are taxed. For the reasons stated I am unable to concur in the view of the majority of the court, and in my opinion the judgment of the trial court should have been affirmed. x

I am authorized to state that Mr. Justice Eschweiler and Mr. Justice Jones concur in this dissenting opinion.

[fol. 225] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—June 22, 1925

The court being now sufficiently advised of and concerning the motion of the said Respondent for a rehearing in this cause, it is now here ordered and adjudged by this court that said motion be, and the same is hereby, denied, with \$25.00 costs and costs of motion.

[fol. 226] IN SUPREME COURT OF WISCONSIN

[Title omitted]

CLERK'S CERTIFICATE

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause

That the original writ of error, the petition therefor and order allowing the same, the citation with its service endorsed thereon, the assignment of errors, certificate of lodgment and a copy of the bond

are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 23rd day of July, A. D., 1925.

Arthur A. McLeod, Clerk of Supreme Court Wisconsin. (Seal of Supreme Court of Wisconsin.)

[fol. 227] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed Aug. 10, 1925

It is stipulated by and between the plaintiff in error and the defendants in error, by their respective attorneys, that the following portions of the Record, which counsel believes sufficient to show the errors complained of and to present to the court the questions arising in this proceeding, shall be printed:

	Record page
Writ of Error	1-3
Petition Therefor	4-13
Order Allowing Writ	14-15
Assignment of Errors and Prayer for Reversal	16-19
Pleas before Wisconsin Supreme Court	31
Complaint	34-41
Answer	42-48
Findings of Fact and Conclusions of Law	49-55
Judgment	72-73
Bill of Exceptions together with Exceptions to Findings of Fact, Defendant's proposed Findings of Fact and Exceptions to Court's refusal to find, if not in Bill of Exceptions	74-138
Defendant's Exhibit No. 1, Report for April 28, 1921	143
Defendant's Exhibit No. 2, Report for June 30, 1921	144
[fol. 228] Defendant's Exhibit No. 3, Report for Feb. 21, 1921	145
Defendant's Exhibit No. 4, Report for Sept. 6, 1921	146
Testimony	160-163
Argument in Wisconsin Supreme Court	172
Judgment of Wisconsin Supreme Court	173
Opinion of Wisconsin Supreme Court	174-210
Dissenting Opinion by Chief Justice Vinje	211-220

It is further stipulated and agreed that if any necessary part of the Record be not thus printed, that the plaintiff in error has the right to print or may be required by the defendants in error to print any further or additional portions thereof. This is without prejudice to either party, the cause being for hearing and determination as though the whole Record were printed in full and at length.

Plaintiff in error hereby states in pursuance of Rule Eleven of the United States Supreme Court that it intends to rely on each and all of the errors set forth in the Assignment of Errors in this cause.

Dated this 4th day of August, 1925.

Geo. R. Miller, Edwin S. Mack, Arthur W. Fairchild, J. G. Hardgrave, E. W. Sawyer, Attorneys for Plaintiff in Error. [fols. 229 & 230] Herman L. Ekern, Attorney General of the State of Wisconsin; Franklin E. Bump, Asst. Attorney General of the State of Wisconsin; J. C. Russell, Attorney for the City of Hartford; Edward M. Smart, of Counsel & Atty. for City of Hartford, Attorneys for the Defendants in Error.

[fol. 231] [File endorsement omitted.]

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Brief For Plaintiff In Error

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. [REDACTED] 186

FIRST NATIONAL BANK OF HARTFORD,
WISCONSIN,
PLAINTIFF IN ERROR,

vs.

CITY OF HARTFORD AND STATE OF WISCONSIN,
DEFENDANTS IN ERROR.

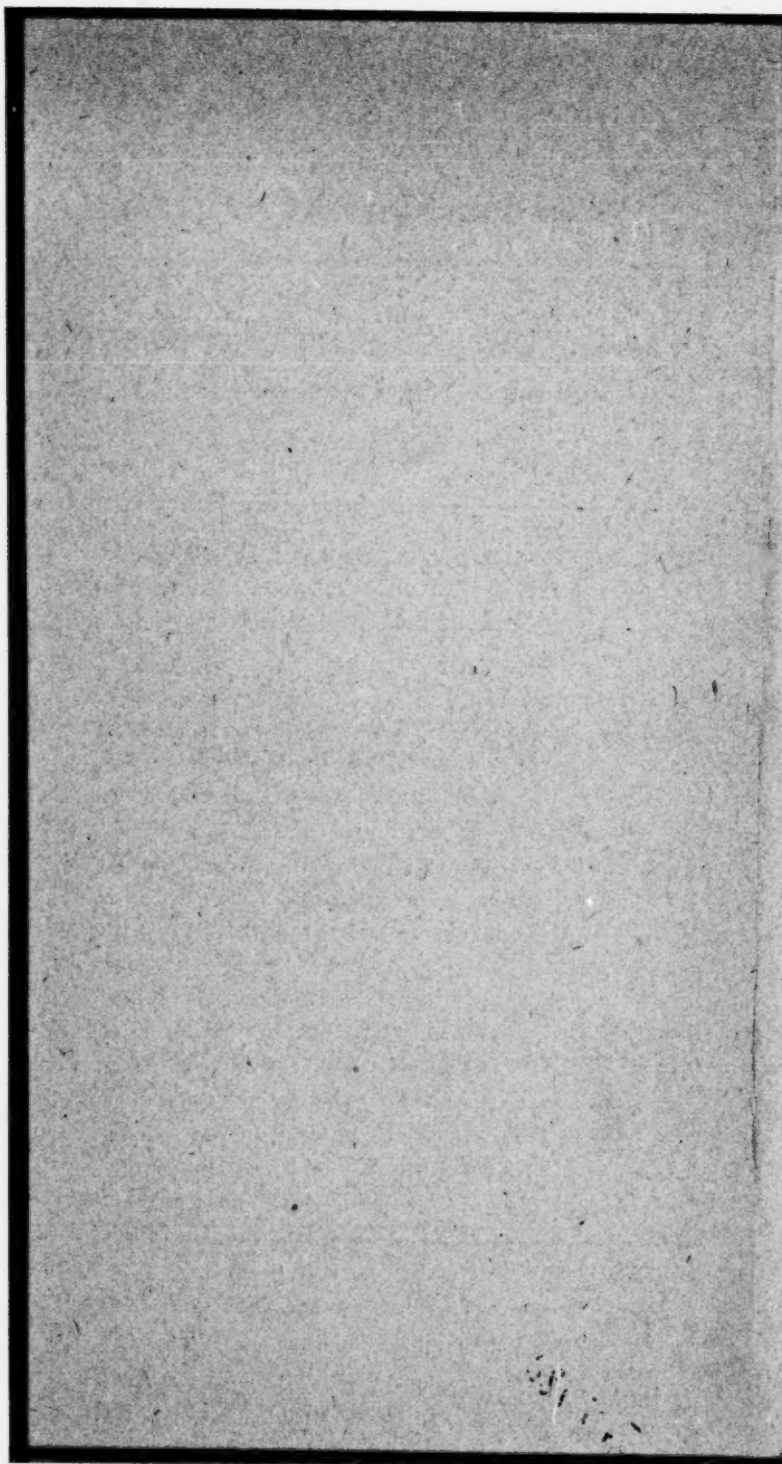
IN ERROR TO THE SUPREME COURT OF THE STATE OF
WISCONSIN.

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INSERT

Note. The jurisdiction of this Court was so clearly settled and the question involved was so narrow that in writing the brief we overlooked the requirement of a statement on jurisdiction and an abstract of the assignment of errors. They are here set forth.

CLAIMS AND RULINGS.

While not so designated in any heading, these are covered by pages 2 to 7, *infra*.

JURISDICTION.

Jurisdiction in this case rests on Section 237 of the Judicial Code as amended by the Act of February 13, 1925, and is sustained by the following decisions:

Merchants' National Bank vs. Richmond, 256 U. S. 635, 637.

First National Bank of Guthrie Center vs. Anderson, — U. S. — (not yet officially reported), 46 Sup. Ct. 135.

ASSIGNMENT OF ERRORS.

The Supreme Court of Wisconsin erred:

(1) In holding that the Wisconsin bank stock tax *statutes*, in so far as the same provided for the assessment and taxation of shares of stock in national banks, while they exempted all other moneyed capital, were valid laws and within the consent conferred by Section 5219 and in refusing to hold that the same were invalid because *repugnant to the Constitution of the United States and to Section 5219*;

II

(2) In refusing to hold that said *statutes* were invalid on the ground that they *operated to deprive the plaintiff in error and its shareholders of the right and privilege of immunity* from taxation by the state otherwise than in the manner and to the extent permitted by Section 5219, to which as an agency of the National Government it was entitled;

(3) In holding the *tax* to be legal and in refusing to hold it illegal and void because *repugnant to the Constitution and to Section 5219*;

(4) In refusing to hold the *tax* illegal and void on the ground that it *operated to deprive the plaintiff in error and its shareholders of the right and privilege of immunity* from taxation set out at (2), *supra*.

(5) In holding it to be a matter of common knowledge that there was no moneyed capital within the state or within the city during the year in question coming into competition with the business of national banks notwithstanding the undisputed evidence and the findings of the trial court amply sustained thereby to the contrary;

(6) In reversing the decision of the circuit court and directing the entry of judgment dismissing the complaint of the plaintiff in error for the recovery of the taxes so illegally assessed, levied and collected (R. pp. 7 to 9).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 636

**FIRST NATIONAL BANK OF HARTFORD,
WISCONSIN,
PLAINTIFF IN ERROR,**

vs.

**CITY OF HARTFORD AND STATE OF WISCONSIN,
DEFENDANTS IN ERROR.**

**IN ERROR TO THE SUPREME COURT OF THE STATE OF
WISCONSIN.**

BRIEF FOR PLAINTIFF IN ERROR.

This case is pending on writ of error to the Supreme Court of Wisconsin to review a judgment of that court reversing a judgment of the Circuit Court for Washington County, Wisconsin, and directing the lower court to enter judgment dismissing the complaint in a suit for the recovery of taxes levied against shareholders of the First National Bank of Hartford, Wisconsin, the plaintiff in error, for the year 1921, claimed by the Bank to be illegal because repugnant to Section 5219 of the Revised Statutes of the United States, and paid under protest.

Judgment in Circuit Court February 7, 1924, for \$3,190.84 damages and \$113.50 costs (R. 20).

Reversed in Supreme Court with directions to dismiss, after argument had February 14, 1925, opinion filed April 7, 1925, and ruling on motion for rehearing on June 22, 1925 (R. 68). Officially reported as follows:

First National Bank of Hartford vs. Hartford, 187 Wis. 290.

STATEMENT OF THE CASE.

The plaintiff in error, the First National Bank of Hartford, Wisconsin, hereinafter referred to as the "Bank", is a national banking association engaged in business at Hartford, Wisconsin, having a paid up capital stock of \$50,000. The City of Hartford, Wisconsin, one of the defendants in error, is a municipal corporation of the State of Wisconsin authorized to levy and collect taxes for city, county and state purposes. During 1921 the taxing officers of the City assessed and levied a personal property tax for said year on all of the shares of stock of the plaintiff Bank at the then prevailing tax rate in the assessment district in which the Bank was located, to-wit: at the rate of \$3.177 on each \$100 of the assessed valuation, which tax on the whole of said stock amounted to \$2,859.30. Said taxes were entered on the tax roll, and the warrant for the collection thereof was placed in the hands of the City Treasurer (R. complaint 11; answer 14, 15; findings 17, 18).

Said taxes were assessed and levied under and pursuant to Sections 70.31, 70.37, 70.38, 70.39 and 70.40 of the Wisconsin Statutes for 1921, which provided specifically for the assessment and taxation of shares of stock in every bank or banking association, whether organized under the authority of any law of the State of Wisconsin or any act of the Congress of the United States, notwithstanding the fact that by Subdivision (10) of Section 70.11 of said statutes it was provided that all moneys or debts due or to become due to any person and all stocks and bonds other than shares of stock in

banks and banking associations should be wholly exempt from taxation.

The statutes of the state on this subject are set out in appendices C and E, *infra*.

Acting under and pursuant to the statutes aforesaid, the taxing officers made no assessment against and levied no taxes on any intangible property except shares of stock in banking corporations (Hahn, city assessor, R. 21 to 24; Radke, city clerk, R. 24; findings, R. 18).

On February 28, 1922, the Bank, on behalf of its stockholders as well as in its own behalf and interest, and in the manner provided for under the statutes of Wisconsin, paid said taxes under protest to the city treasurer (Complaint, R. 12; answer, R. 15; findings, R. 18, 19).

If it be assumed that the tax was illegal, the Bank, having made the payment under protest, is entitled under the laws of Wisconsin to maintain an action to recover back any sum paid by it on account of taxes so illegally assessed and levied (Opinion Supreme Court of Wisconsin, R. 71).

TRIAL COURT FINDING ON COMPETING MONEYED CAPITAL.

On the question as to the existence of competing moneyed capital, the trial court found as follows:

"That during the year 1921 there was a very large amount of moneyed capital in the hands of individual citizens of said city of Hartford, running into many hundreds of thousands of dollars, that was neither assessed for taxation nor taxed, which entered into competition with the banking business, including the banking business of the plaintiff.

"That during said year, 1921, there were vast amounts of moneyed capital in the hands of individual citizens of this state, running into millions of dollars that entered into competition with the banking business, that under the provisions of said section 70.11 subsection 10, were wholly exempted from taxation.

"That as a result thereof, the shares of stock of said plaintiff bank as well as the shares of stock of other national banking corporations doing business in this state, were taxed or attempted to be taxed at a much greater rate than other moneyed capital in the hands of individual citizens of said city and state, that entered into competition with the banking business, including the banking business of the plaintiff; and the taxation of said shares of stock in said banks, including the plaintiff bank, and the exemption of said amounts of moneyed capital in the hands of individual citizens entering into competition with the banking business, resulted in an unjust, illegal and discriminating tax against said bank's shares." (R. 18).

SUPREME COURT DECLARATION ON COMPETING MONEYED CAPITAL.

Referring to the foregoing finding, the Supreme Court of Wisconsin said:

"At this point we may say that in our consideration of the validity of this legislation, we do not consider ourselves concluded as in an ordinary case by the findings of fact made by the trial court, not only because the findings are general in their terms and present matters which are mixed questions of law and fact, but for the further reason that the law under consideration is one of state wide application. The court is required to take judicial notice of the general conditions to which the law applies. It is either valid in toto or void in toto. Its validity cannot be made dependent upon a particular finding of fact relating to the conditions in a single locality so that, assuming it to be administered as written, the law might be held valid in one place, void in another, or valid at one time and void at another. *State vs. Layton*, 160 Mo. 74; *Pittsburgh C. C. St. L. R. Co. vs. Hartford City*, 170 Ind. 674; *St. Louis vs. Liessing*, 190 Mo. 464; 1 L. R. A. (N. S.) 918; 20 L. R. A. (N.

S.) 461. In this respect this case differs materially from some of the cases heretofore decided by the Supreme Court of the United States." (R. 76).

The court then proceeded, upon consideration of matters of which it saw fit to take judicial notice, to draw the following conclusions:

"(c) All persons, firms and corporations doing a banking business are required to organize as banks and so become taxable as national banks are taxed. There is no business conducted within the state which is in direct competition with national banks not taxed as national banks are taxed. (R. 89, 90).

"(d) Moneyed capital in the hands of individual citizens, invested in mortgages and securities for their own personal benefit, does not in fact compete as a business with moneyed capital invested in shares of national banks for the business which national banks are authorized to do. If there is any competition as to loans, such competition is within such a narrow and restricted field and so inconsequential in amount as not to be in fact discriminatory within the decisions already cited." (R. 90).

As we proceed we shall point out that the law requiring persons, firms and corporations doing a banking business to organize as banks and so become taxable as national banks are taxed has reference only to the business of banks of deposit. There is nothing in the laws of Wisconsin to prevent an individual, firm or corporation from carrying on all the business commonly carried on by a bank of discount and in so doing from employing any amount of moneyed capital in that business.

DISSENTING JUSTICES' VIEWS.

While the Supreme Court overrode the findings of the trial court on conclusions drawn from matters declared to be

within the field of judicial notice, three of the seven members of the court dissented, their views being voiced by the Chief Justice in an opinion in the course of which he says:

"The undisputed evidence in the case shows that there is such competition so far as the plaintiff bank is concerned. The taxing officer and the state introduced no evidence to rebut that which the bank offered, so that the testimony in the case is undisputed except in so far as it may be in conflict with facts of which the court may take judicial notice. (R. 91; 187 Wis. 290, 326) * * *

It seems to me that the uncontradicted testimony of the president of the plaintiff bank that there are a number of loan companies in the city of Hartford that come in direct competition with the loaning business of the First National Bank is in accordance with facts generally known to exist in the banking and loaning business, and that it is quite probable, as he says, that the condition existing in his locality obtains throughout the state. (R. 92; 187 Wis. 290, 327, 328) * * *

But as was said in *Mercantile Bank vs. New York*, 121 U. S. 138, 7 Sup. Ct. 826, a part of the legitimate business of a national bank is 'the discounting of commercial paper, making loans of money on collateral security, and negotiating loans, dealing in bonds, etc.' Now it is a well known fact that in our state there are numerous private individuals and partnerships and corporations that can and do engage in this class of business just mentioned which is a part of the business of a national bank, and the money invested in such enterprises runs into the millions of dollars and the business transacted by them runs into the hundreds of millions of dollars annually." (R. 94; 187 Wis. 290, 330).

We shall later point out:

1. That the undisputed evidence established the existence of substantial amounts of competing moneyed capital;

2. That the finding of the trial court was not only amply sustained but required;

3. That the declaration of four members of the Supreme Court cannot make anything a matter of common knowledge where three members not only disagree but declare that the contrary is established as a matter of common knowledge; and

4. That nothing can be a matter of common knowledge to the Supreme Court of the State of Wisconsin which, without the aid of any information from an opinion of that court, is not already a matter of common knowledge to the members of this court.

The evidence was not only sufficient to support the findings of the trial court but left no room for any other finding.

UNDISPUTED EVIDENCE AS TO OTHER MONEYED CAPITAL IN COMPETITION WITH NATIONAL BANKS.

The existence of large and substantial amounts of competing capital was established by the undisputed testimony of John G. Liver, the president of the bank (R. 24 to 46, 56); Hugh W. Grove, treasurer of the First Wisconsin Company of Milwaukee (R. 46 to 51); Edward C. Schauer, secretary and treasurer of the Hartford Building & Loan Association (R. 51 to 56); C. W. Sayles, a dealer in mortgages at Hartford (R. 57, 58); Edward Russell, engaged in the loan business at Hartford (R. 65, 66); and W. T. Leins, register of deeds of Washington County (R. 57).

Mr. Liver, for over 50 years a resident of Hartford, for 17 years president of the bank, for two years president of a territorial group of the Wisconsin Bankers' Association, comprising Dodge, Washington, Walworth and Rock counties, and who prior to engaging in the banking business had been engaged in various business enterprises, including that of general merchandising at Hartford, and who was familiar with business conditions in that community (R. 24, 25), testified in substance as follows:

Hartford, a city of about 4,500, has tributary thereto a prosperous farming community in which financial conditions are good (R. 25). A considerable number of farmers living around the city move there when they retire (R. 25, 26). The plaintiff bank does not confine its business to the city alone, but extends it to the surrounding territory (R. 25, 26).

The bank receives deposits, loans money to individuals and corporations, has a savings box department, deals in exchange and does the other business that may properly come before a bank. It buys and sells government bonds, notes, mortgages and securities, discounts commercial paper, loans on mortgages and buys mortgages, though the latter is not a large part of its business, and deals in bonds of organizations like the Wisconsin Farm Loan Association, which it buys for its own investments and to accommodate its clients, a good many of which are disposed of to such clients—to individuals (R. 26).

There were various individuals and concerns engaged in selling notes, mortgages and securities in the city in 1921 and prior thereto (R. 26, 27).

Asked to name a few of these he specified Mr. Ed. Russell, who had been in that line of work in Hartford about eight or ten years, and conducted his business quite extensively (R. 27); Charles Sayles, residing in the city, and engaged in the loan business (R. 27); Mr. Thoma (R. 27); and the Hartford Building & Loan Association (R. 27).

There are real estate firms in the city engaged in loaning out money to individuals in the community, notably among these being Sauerhering & Gehl, who make loans on real estate and have been in that business approximately 12 or 15 years (R. 27).

These concerns had loaned out to individuals a large amount—about \$250,000 or \$300,000 annually (R. 27).

These loaning concerns competed with the business of the

bank the same as any other bank would be in competition (R. 27).

The bank loans from whatever funds it has on deposit and where money is withdrawn that affects its loaning department. These withdrawals up to and including 1921 of which he had personal knowledge were substantial in amount. Compared to what is invested in the capital stock of the bank it would be a good deal larger amount (R. 28).

Other concerns located in Milwaukee and Chicago are engaged in buying and selling securities, mortgages, notes and bonds in that community in addition to the local concerns. They come right out to the city and solicit and they circularize when they issue bonds.

Asked to name some of these that came to his city he named First Wisconsin Company of Milwaukee, Morris F. Fox & Co., Edgar Ricker & Co., Grossman, Lewis & Company, Best & Gregg Co. They cover territory outside of the city.

The general nature of the securities they offer includes bonds, notes, mortgages and stocks; among the bonds, real estate bonds and utility bonds; in fact all kinds of bonds—bonds on buildings, bonds on farms, and municipal bonds (R. 28). The effect upon the banking business when non-local bonds are sold in the community is that people draw out their money and buy bonds (R. 28). They draw from savings accounts and some time certificates (R. 29). The effect of the sales of these bonds and securities upon the banking business is that it reduces deposits. Savings accounts are slowly built up (R. 29). These so-called bond houses sell their bonds and securities in the banking district tributary to Hartford in substantially large quantities—quite so (R. 29).

The Hartford Building & Loan Association, a concern engaged in loaning money, has been in business in Hartford

for 8 or 10 years. Asked how they competed with the banking business he answered: "Well that competes with the banking business the same as the banks do. They receive deposits and make loans." It has been their prevailing practice to pay interest at the rate of 5%. The prevailing rate that the banks pay is 3%. The effect upon the banking business is that when people can get 5% "they prefer to take it there instead of to us" (R. 29).

Merchants and manufacturers put the bulk of their account in checking accounts. A large amount of the certificate of deposit account is held by retired farmers—pretty much by individuals (R. 29, 30).

He knew from his experience as a banker and his financial connection with the Wisconsin Bankers' Association that the situation to which he testified at Hartford was the same in banks generally, the amounts in some localities being, of course, very large. The effect upon the banking business—upon the way in which moneyed capital competes with the banking business is about the same all over (R. 30).

A concern known as the Ziegler Company, with its home office at West Bend, engaged in the real estate and loan business, does a large amount of loan business in Hartford, where it has an agency or representative. They push their business by circularizing their loans and solicit in many ways, and have made large loans to individuals in the city running up in the thousands of dollars. Their loaning business is quite large (R. 30).

On cross-examination it was developed that on May 1, 1921, the bank owned in the neighborhood of \$35,000 of municipal bonds and \$60,000 of government bonds (R. 33), that the fact that Sauerhering & Gehl make loans causes losses to the bank (R. 39), that there are lots of concerns like the building and loan associations that take deposits and hold them as deposits (R. 39), that the bank frequently

bought bonds for its own investment, that it had bought Washington County bonds directly from the municipality, that in May, 1921, it owned about \$30,000 or \$35,000 of municipal bonds, that it bought some of these bonds from concerns that were in competition with it, that they had had withdrawals from the bank by virtue of these concerns being in competition with it for the last ten or twelve years (R. 40).

On re-direct examination he stated that the Washington County bonds purchased by the bank it had sold right at home, mostly to its clients. They come in to inquire for investments and the bank tells them what it has as a matter of service to the people. "We think we give them pretty good investments" (R. 44, 45). He also stated that if loans had not thus been made to individuals and funds withdrawn for that purpose, the loaning power of the bank would be strengthened (R. 45).

The bank had been interested in obtaining federal loans and had made one federal loan about six months before the trial (R. 45).

He also stated that he personally had approximately \$10,000 out on interest-bearing securities, the interest averaging about $5\frac{1}{2}\%$ and bringing in an income of \$600. The maximum tax that he would have to pay on an investment of \$10,000 would be about \$17 or \$18. If he invested the same in capital stock of the bank in 1921, his tax on the investment would have been approximately \$300 (R. 45, 46).

During 1920 and 1921 the bank was in the business of selling Wisconsin farm mortgage loans gotten from the Wisconsin Securities Company in Milwaukee and sold during 1921 in the neighborhood of \$30,000 or \$40,000. Asked under what circumstances these bonds were bought and sold, he said: "In the first place they were bought for our own investment, but we sold some to our clients when they wanted an investment, a good investment." But that was not the prime purpose of purchasing them (R. 56).

Hugh W. Grove is treasurer of the First Wisconsin Company, which is engaged in underwriting, wholesaling and general distribution of bonds and investment securities. In general it is engaged in the so-called bond business. In 1921 the business of that company in the sale of bonds and other securities extended to many million dollars—less than \$100,000,000 and more than \$25,000,000 (R. 46). It sold its bonds in Wisconsin and the upper peninsula of Michigan and occasionally outside of the state. Probably in excess of 90% were sold in Wisconsin. They were sold to individuals and corporations—largely to individuals. The average return on the corporation securities sold by it in 1921 was probably 7%, the maximum being about 8% (R. 47).

There are many other firms and individuals engaged in the selling of bonds in Milwaukee. He said that he could give the names of a good many and mentioned Second Ward Securities Company, Morris F. Fox & Company, Henry C. Quarles & Co., Edgar Ricker & Company (R. 47).

There are a large number of individuals in Milwaukee engaged in selling bonds who sell their bonds quite largely—extensively throughout the state (R. 47).

The preferred stock of the First Wisconsin Company is held very largely by the stockholders of the First Wisconsin National Bank. All of the common stock, excepting directors' qualifying shares, are held for the present and future stockholders of that bank, there being a direct relation between the First Wisconsin Company and the First Wisconsin National Bank. He stated the reason for that affiliation as follows: The First Wisconsin as such transacts the investment business which would naturally come to such affiliated institutions and inquiries which come to the affiliated institutions are turned over to the First Wisconsin Company, it being in that business. In that respect it relieves the bank of that work (R. 48).

There is competition between bonding companies as such and national banks. The First Wisconsin Company conducts some of the business that would ordinarily be conducted by the First Wisconsin National Bank.

A bonding company would come into competition with a national bank in two ways, competition for capital and competition for money which would ordinarily be on deposit with the bank.

Asked what he meant by competition for capital, he said: "Well in order to establish a national bank it is necessary to sell its stock and somebody has to furnish the money to buy the stock. Bonding houses are also soliciting those people who have funds for investment in securities, and naturally if all of the people who have funds to invest invested it in securities other than bank stock, the bank would be hard pressed to obtain capital on which to operate, and in that sense they are in competition for capital." (R. 48).

The amount of money invested in bonds and other investments and securities in Wisconsin in 1921 would run into many million dollars. As to the number of millions he could not say, but at least it runs into the millions (R. 48, 49). A very substantial proportion of that is held by individuals.

The amount of capital stock, undivided profits and surplus of national banks in Wisconsin in 1921 in round numbers was between \$50,000,000 and \$55,000,000. The figures for state banks are slightly in excess of that, between \$55,000,000 and \$60,000,000. The amount of money invested in bonds and other investments exceeds that invested in national and state banks many times, and that was true in 1921 (R. 49).

There is competition for business between national banks and bonding companies and individuals engaged in selling bonds. Asked how that competition takes place, he said: "That competition might arise in several ways. It might arise directly in that national banks are authorized to buy

and sell securities, or competition would arise in the money which the two institutions would lend. I apprehend that one of the functions of national banks is to lend money. Investment houses dealing in all kinds of securities would come into competition with such loans, especially in short time loans." (R. 49).

Money that is awaiting investment is largely held by individuals and a large part of it is on deposit with national banks. When that is invested the money is withdrawn from the banks by the depositor to pay the vendor of the bond (R. 49).

The witness was acquainted with individuals in Milwaukee engaged in making personal loans and in selling bonds and securities. The aggregate of their loans, even those he was acquainted with—is a very substantial amount (R. 49). If he were to take the trouble to compile a list of those he was not acquainted with it would be a long list with a large number of names (R. 49, 50). There are many other individuals engaged in selling mortgages.

There are also so-called acceptance companies in Milwaukee in the business of lending money and discounting commercial paper, and they compete directly with national banks. Their business is one of the functions of national banks—the discounting of notes. Asked if acceptance companies and individuals have taken over a large part of the business of national banks, he said: "In my judgment acceptance companies do handle large sums." (R. 50).

There are individuals engaged in selling foreign exchange in Wisconsin. That business comes into direct competition with national banks. The American Express Company is engaged in selling foreign exchange. That is one of the functions of national banks, so that there would be direct competition (R. 50).

The bonds sold by the First Wisconsin Company are both local issues and issues from without the state—a substantial

amount from out the state. When these bonds are sold a large proportion of the money would go to the east (R. 50).

The stockholders of the various bond houses mentioned as located in Milwaukee are very largely citizens of Wisconsin. There might be a few outside of the state, but not very many. Some of the companies named are partnerships, in which case the partners reside in Milwaukee (R. 50, 51).

On cross-examination he stated that the First Wisconsin Company was in competition with the First National Bank in the sale of bonds, assuming for that answer that one of the functions of national banks is selling bonds. Also that the First Wisconsin National Bank, through its officers and directors, organized the company to take over two of the functions of the First Wisconsin National Bank (R. 51).

Edward C. Schauer is secretary and treasurer of the Hartford Building & Loan Association.

His association was engaged in the business of loaning money at Hartford since December 1, 1916, carried on its operations within twenty-five miles of Hartford, and was permitted to loan to any one in that territory who might become a member. Its loans were restricted to farmers and home owners. About 90% of the individuals from whom its revenue was received live within a radius of ten miles of Hartford. It followed the practice of receiving money and issuing stock certificates. Where the entire amount was loaned by the individual at one time, there was issued a paid-up stock certificate. The individual had the right to receive his money back on thirty days' notice in writing, when he would receive the amount agreed upon when the money was placed with the association, the present prevailing rate being 5% (R. 52, 53). The association had paid as high as 5½% and as low as 4%. A fully paid certificate holder was required to be paid the prevailing rate every six months, which for three years had been 5%. It was the practice to place all moneys so received in the depository voted by the associa-

tion. Except for a period from about March 1st to April 1st, 1923, when the government was paying the War Savings stamps of the 1923 issue and the association was flooded with funds, it had always taken money from those offering it. It may receive money from outside the twenty-five mile radius but can only make loans within that radius (R. 53).

The association also issues installment stock certificates to those not caring to acquire a paid-up stock certificate. The installment stock certificate holder can withdraw the entire amount paid in at any time but is penalized if he withdraws within one year. He will receive no dividends. If he withdraws after one year he will receive 70% of the dividends (R. 54).

The greatest portion of the earnings of the association consists of interest received from mortgage loans. As this is received the company reinvests in first mortgages. The interest received from these first mortgages or loans is the principal source of its earning power. The members receive their proper share of the net interest earnings when accumulations are pro-rated (R. 54).

At the close of business on December 31, 1921, the mortgage loans outstanding amounted to \$136,664.86. There were also outstanding stock loans amounting to \$1,740.00 (R. 54, 55). The paid up stock amounted to \$77,502.71 and the outstanding certificates to \$43,691.85 (R. 55).

As reasonable amounts of money are gotten together, it is placed in a check account in the First National Bank of Hartford, with which all of its business has been done. It aims to keep its money working (R. 55). The large amount of its loans requires that. It does have considerable amounts on deposit at the bank and during the spring of 1924 it had as high as \$14,000 at one time. That was an exceptional condition of affairs, however (R. 56).

Mr. W. T. Leins, register of deeds of Washington County, testified in substance as follows:

I have made a compilation of the amount of mortgages recorded in Washington County, Wisconsin, in the year 1921, running to individuals. The amount of these mortgages is \$1,507,810.54. "It is very seldom that we have any mortgages to record in which the mortgagees are non-residents." (R. 57).

Mr. C. W. Sayles testified as follows:

He had lived in Hartford twenty years and had been engaged in selling mortgages in Hartford and the vicinity during the preceding ten years. The outstanding mortgages sold by him to individuals residing in the vicinity of Hartford amounted to about \$500,000 (R. 57). Practically all of the money for which these mortgages were purchased went to western states. He had practically that amount of mortgage loans outstanding in 1923. They were interest bearing securities, the approximate rate being 6%. He got these mortgages from banks and loan companies. Some from Peters & Co., Minnesota, and Central Mortgage Company, Minnesota, and Interstate Securities Company, Minnesota. On the average these loans usually ran five years (R. 58).

Mr. Edward Russell testified in substance as follows:

In the insurance and loan business in Hartford for at least ten years. The individuals for whom he had loaned during the past ten years resided in Hartford and surrounding country. He loaned out money from time to time to such individuals on interest bearing securities—on bonds and mortgages. The land on which the mortgages were given was in North Dakota. These mortgages ran from three to five years and the average rate of interest was 6% (R. 65).

The city introduced in evidence the reports of the condition of the bank under the following dates: April 28, 1921 (Defendant's Exhibit 1, R. 143 and 143A); June 30, 1921

(Defendant's Exhibit 2, R. 144 and 144A); February 21, 1921 (Defendant's Exhibit 3, R. 145, 145A); and September 6, 1921 (Defendant's Exhibit 4, R. 146 and 146A).

These reports are on Treasury Department forms, and these forms indicate among other things the securities which it is contemplated that national banking associations may hold and the activities in which they may engage.

Each of these reports contains among other things a detail of bonds, securities, etc., other than United States securities, held by the bank, in which schedules are blanks for the following securities: (a) state, county, or other municipal bonds, (b) railroad bonds, (c) other public service corporation bonds, (d) all other bonds, (e) claims, warrants, etc., (f) judgments, (g) collateral trust and other corporation notes (*report of February 21, 1921, Schedule (19), R. 145A*); also (h) stock of Federal Reserve Bank, and (i) stock of other corporations (*report of April 28, 1921, Schedule (13), R. 143A; report of June 30, 1921, Schedule (12), R. 144A; report of September 6, 1921, Schedule (14), R. 146A*).

The detail of "Loans and discounts, including re-discounts" in the report of February 21, 1921, under Schedule (8) (R. 145A), contains the following items:

"Secured by real estate mortgages or other liens on realty NOT in accordance with Section 24, Federal Reserve Act, as amended... ..

"Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended 33,325.00"

That of April 28, 1921, contains in Schedule (5) (R. 143A) the following items:

"Secured by real estate mortgages or other liens on realty NOT in accordance with Section 24, Federal Reserve Act, as amended... 12,450.00

"Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended 20,875.00"

Under Schedule (6), on page 2, appear two real estate mortgage loans taken in 1920. Under Schedule (7) appear six city and six farm real estate mortgage loans taken on various dates during the years 1916 to 1920 inclusive (R. 143A).

The report of June 30, 1921, contains on the first page the item "Loans and discounts, including re-discounts" (R. 144), the detail of which is given under Schedule (5) on page 2 (R. 144A), where appear the following items:

"Secured by real estate mortgages or other liens on realty NOT in accordance with Section 24, Federal Reserve Act, as amended... 12,450.00

"Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended 20,125.00"

The report of September 6, 1921, contains in Schedule (5) (R. 146A) the following items:

"Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended:

1. On farm land..... 11,200.00
2. On other real estate..... 8,775.00

"Secured by real estate mortgages or other liens on realty NOT in accordance with Section 24, Federal Reserve Act, as amended:

1. For debts previously contracted (Section 5137, R. S. U. S.)—
 - a. Farm lands 14,064.00
 - b. Other real estate.....
2. All other real estate loans—
 - a. Farm lands
 - b. Other real estate....."

ARGUMENT

I.

GENERAL CONTROLLING PRINCIPLES.

The states having no power to tax national bank stock except by congressional permission, and the only permission granted being subject to the restriction that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens" of the state (Sec. 5219 U. S. R. S.), *taxation of other moneyed capital is a condition precedent to the taxation of national bank stock.*

The state of Wisconsin claims to have complied with this condition—that is to have taxed all other moneyed capital and at the same rate—because (as it is claimed) it has forbidden the conduct of banking business except by incorporated banks and has taxed all bank stock, state and national, alike, and that, aside from stock in such banking corporations, it is a matter of common knowledge, evidence and findings of a trial court to the contrary notwithstanding, that there is no other moneyed capital within the meaning of the permissive statute within the state.

All moneyed capital other than shares of stock in banking corporations is in fact wholly freed from taxation on the ad valorem system and there is no claim that there is any approach whatever to an indirect equivalent through the operation of the income tax law. (R. 76, 77. First National Bank of Hartford vs. Hartford, 187 Wis. 290, at 305.)

The statute restricting the conduct of banking business to incorporated banks is limited in its application to the business of the "soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business." It does not reach either individuals operating private banks of discount or individuals or shareholders of corporations engaged "in operations and investments other than receiving deposits

normally common to the business of banking" (*number 1 of the summary of purposes of Sec. 5219 in First National Bank vs. Anderson, U. S., 46 Sup. Ct. Rep. 135, 138*); nor moneyed capital "employed, substantially as in the loan and investment features of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and re-investment" (*number 2 of summary aforesaid*).

To paraphrase from *Merchants' National Bank vs. Richmond*, 256 U. S. 635 and *First National Bank vs. Anderson*, U. S., 46 Sup. Ct. Rep. 138, the state "took the position that the congressional restriction was directed only against discrimination in favor of state banking associations."

Where, as here, the state enacts a law under which bank stock is taxed while it is directed that no other moneyed capital shall be taxed, that law is void on its face; and no proof of the existence or character of such other moneyed capital is required. That the law must operate in contravention of the permissive statute is apparent on its face and needs no proof.

But if proof be required the evidence upon which the trial court found the existence of competing moneyed capital was undisputed and amply sustained the finding, and requires the same finding in this court.

II.

A STATE LAW IMPOSING ANY TAX ON SHARES OF STOCK IN NATIONAL BANKING ASSOCIATIONS NOT PERMITTED BY SEC. 5219 U. S. R. S. VIOLATES THE CONSTITUTION OF THE UNITED STATES.

Early in the history of national bank legislation it was held that national banks were federal agencies not subject to state sovereignty or to state control, but exclusively within the control of the federal government, and that any attempt

on the part of the state to tax them without the consent of Congress was beyond the state's power and void. This was necessary to the preservation of the federal government, since the power to tax involves the power to destroy. Fundamentally such a law is held invalid not by reason of a congressional prohibition but because it violates the Constitution of the United States.

McCulloch vs. Maryland, 4 U. S. (4 Wheaton) 316.

First National Bank vs. California, 262 U. S. 366.

Des Moines National Bank vs. Fairweather, 263 U. S. 103.

First National Bank of Guthrie Center vs. Anderson, ... U. S. ..., 46 Sup. Ct. Rep. 135, 138.

The basic principle is thus stated in the case last cited: "National banks are not merely private moneyed institutions, but agencies of the United States, created under its laws to promote its fiscal policies; and hence the banks, their property, and their shares cannot be taxed under state authority except as Congress consents, and then only in conformity with the restrictions attached to its consent."

First National Bank vs. Anderson, ... U. S. ..., 46 Sup. Ct. Rep. 138.

We submit that any law which must of necessity work in contravention of a constitutional limitation on legislative power whenever called into operation is in excess of that power from the moment of its enactment and void. Given a law under which no tax can be levied on other moneyed capital, that law must be held invalid as applied to national bank stock without regard to the present existence of other moneyed capital.

III

ALL MONEYED CAPITAL EXCEPT THAT INVESTED IN SHARES OF STOCK IN BANKS BEING EXPRESSLY EXEMPTED FROM TAXATION, DISREGARD OF THE CONGRESSIONAL RESTRICTION IS APPARENT ON THE FACE OF THE LAW AND ANY TAX ON SHARES OF STOCK IN NATIONAL BANKS THEREUNDER IS VOID.

In 1911 the State of Wisconsin abandoned the age old system of ad valorem taxation so far as personal property is concerned and went over to the system of income taxation. This was accomplished by the exemption of intangible personal property and the offset of the tax on tangible personal property against income taxes (R. 74). Up to that time it had been the purpose of the state, manifested by its taxing statutes, to tax all moneyed capital in general on the ad valorem basis. After that time it became the purpose of the state to exempt all moneyed capital in general and to impose an ad valorem tax only in special cases. It was assuming that the only comparison required was a comparison between national banks and state banks. In this the state legislature was in error.

Instead of a general purpose to tax all moneyed capital on the ad valorem basis, we now find a *general purpose to exempt* all moneyed capital from taxation on that basis. Exemption was no longer the exceptional thing. Taxation became the exceptional thing. Decisions dealing with partial exemptions or with limited rights of offset of debts against credits, necessarily exceptional in their character, must sometimes require the consideration of evidence in order to determine whether the proportion thereof which is left free from taxation is so great that it can be said to result in substantially lower taxation for moneyed capital as a whole than that levied on shares of stock in national banks. But it is quite a different thing to say that when

the court finds a statute which on its face manifests a general purpose to relieve other moneyed capital from taxation it will embark into an examination of evidence for the purpose of ascertaining in dollars and cents a result which in a substantial sense is obvious.

There have been on the part of the bar and on the part of some courts some misconceptions which would have been avoided if in reading the decisions of this court certain fundamental principles had been kept in mind. But for these misconceptions there would have been no difficulty in marking out adherence to a consistent line of reasoning leading logically to the decision in *Merchants' National Bank vs. Richmond*, 256 U. S. 635, and the subsequent cases.

Moneyed capital in the hands of individual citizens includes (1) shares of stock in incorporated banks, (2) capital employed in private banking, (3) shares of stock in corporations and other interests owned by individuals in all enterprises in which the capital employed is money and the object of the business is the making of profit by its use as money through investment in securities by way of loan, discount or otherwise, and (4) private investments not employed in private banking, strictly so-called, and yet coming into competition with national banks. The latter includes moneyed capital in the hands of private citizens employed substantially as in the loan and investment features of banking, in making investments by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment.

Congress had in mind when the law was first enacted that the states commonly employed ad valorem taxation in respect to all classes of property, both real and personal, both tangible and intangible; that it was common practice on well-recognized grounds of public policy to provide for reasonable exemptions from all taxation; that the states could not tax government securities without the consent of the na-

tional government, a consent which it was not the custom to grant; that it was common practice in most of the states to exempt public securities, such as state and municipal bonds; that the state, in creating certain classes of corporations, had, in some instances, bound themselves by contract to exempt such corporations either from all taxation or to restrict themselves in respect to the method of levying and the amount of such taxes; and that it was not considered that the states should be bound to adhere to any particular system of taxation so long as they did not run counter to any limitations imposed by the federal constitution intended to safeguard the rights and immunities of citizens of the United States or to insure equality of treatment between them.

It is clear that the act of Congress may be violated:

1. By a *law* taxing bank stock while all other moneyed capital is left untaxed or taxed at a lower rate;

2. By a *law* taxing bank stock and other moneyed capital, but exempting so much of the latter that the net result is to tax the aggregate of other moneyed capital at a lower rate;

3. By a *law* taxing national bank stock by one method and other moneyed capital by another method resulting in a lower rate; or

4. By a *maladministration of a law* providing for taxation of both, which results in *practice* in taxing the aggregate of other moneyed capital at a lower rate.

The *first* presents no issue of fact.

The *second* presents no issue of fact where the substantial character of the exemption is so great as to indicate a violation of the federal statute by the State Legislature itself. Where that is not apparent on the face of the statute, an issue of fact is raised as to whether bank stock is taxed at a higher rate than the aggregate of other moneyed capital.

The *third* usually presents an issue of fact as to whether discrimination actually results in the operation of the law.

The *fourth* always presents an issue of fact.

The case at bar presents, we submit, an instance of a violation of Section 5219 by a *law* taxing bank stock, while all other moneyed capital is left untaxed. This Court have never said that when this appears on the face of the law anything in the way of proof is required. Given a law so framed, the examination of evidence in respect to its operation is like to the attempt to add to one's stature "by taking thought". It is not a case where the general legislative purpose is to tax and the inquiry is as to the practical result of a specific or partial exemption. In that case, proof may be required. It is not a case in which there is a maladministration of a law valid on its face, in which case, of course, proof would be required. It is not a case of a law providing for a totally different method of taxation and which, it is claimed in actual operation, results in discrimination. In such cases, proof may be necessary. It is a case in which the purpose to omit from taxation is a legislative purpose; and it would be idle to weigh evidence for the purpose of determining what is already apparent.

Cases in which all moneyed capital except shares of bank stock is exempt or clearly taxed at a lower rate have consistently been disposed of without proof either as to the amount of moneyed capital involved in the exemption or discrimination or as to its competitive character.

People vs. Weaver (1879), 100 U. S. 539;

Supervisors vs. Stanley (1881), 105 U. S. 305;

Hills vs. Exchange Bank (1881), 105 U. S. 319;

Evansville Bank vs. Britton (1881), 105 U. S. 322;

Whitbeck vs. Mercantile National Bank (1887), 127 U. S. 193;

First National Bank vs. Chapman (1898), 173 U. S. 205.

Covington vs. First National Bank (1904), 198 U. S. 100;

Citizens National Bank vs. Kentucky (1909), 217 U. S. 443.

We beg leave to discuss the foregoing cases and certain related cases which can only be reconciled upon a recognition of the foregoing principles.

The case of *Lionberger vs. Rouse* (1869), 9 Wall. 468, arose under the Act of 1864 and the discrimination complained of was the failure to tax at the same rate as national bank stock the shares of *two* banks of issue created by the state prior to the passage of the National Banking Law by an act in which the state had limited its power to tax. The decision went on the ground that the second proviso in the Act of 1864 meant no more than to require that each state should [9 Wall. 476], "as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation." It simply illustrates *a purpose to recognize the general power of the states over their own taxing methods and to disregard inconsiderable exemptions.*

In *People vs. Weaver* (1879), 100 U. S. 539, the court held that the restriction of Section 5219 went not merely to the rate but to the entire process of assessment, including valuation. The court held that if a state permits an individual to deduct his debts from the valuation of his personal estate generally, it must likewise permit him to deduct them from the valuation of his national bank stock. The particular objection pointed out by the court was to allowing one who has [100 U. S. 543] "*money capital invested otherwise than in banks*, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stocks can make no such deduction." There was no requirement of proof of the character or amount of the "*money capital invested otherwise.*" We submit that this was because *the discrimination was general and not exceptional.*

In *Supervisors vs. Stanley* (1881), 105 U. S. 305, the statute for the taxation of bank stock standing alone contained nothing in conflict with the Act of Congress. The discrimination resulted from another statute, which permitted the deduction of debts from the entire value of personal property, but not from bank stock. The court held that as to any given shareholder who had no debts to deduct the law provided a mode of assessment which so far as he was concerned was not in conflict with the Act of Congress, but that a different situation existed in respect to the shareholder who had debts to deduct. As to him, however, it was worked out by treating the law providing for the taxation of his bank stock as valid while that denying him the deduction was held invalid. The court then said:

[105 U. S. 315] "If he has debts to be deducted, the case of *People vs. Weaver* (100 U. S. 539) shows that in taking the steps which this court has held he may take, he can secure that deduction, and when secured the rest of the law remains valid. *In other words, in such a case, so much of the law as conflicts with the act of Congress in the given case is held invalid, and that part of the State law which is in accord with the act of Congress is held to be the measure of his liability.* There is no difficulty here in drawing the line between those cases to which the statute does not apply and to those to which it does, between the cases in which it violates the act of Congress and those in which it does not. There is, therefore, no necessity of holding the statute void as to all taxation of national bank shares, when the cases in which it is invalid can be readily ascertained on presentation of the facts." (Italics ours.)

The court did not inquire into the question as to the amount of other moneyed capital within the state. It assumed its existence and treated the portion of the statute denying the deduction as invalid on its face. *The defect there*

could be cured by securing to the taxpayer the deduction. It can be cured here only by taxing other moneyed capital. If there was no necessity for the proof of the existence of other moneyed capital in that case, there is no necessity for it in the case at bar. The case just cited was decided on the theory that the law denying the right of offset was void on its face. By the same reasoning, if the law entirely exempted other moneyed capital, it would be held void on its face.

In *Hills vs. Exchange Bank*, 105 U. S. 319, a companion case to *Supervisors vs. Stanley*, 105 U. S. 305, it was held that where a stockholder in a national bank shows that his personal property subject to taxation, including his bank shares, after deducting therefrom his just debts is of no value, he is clearly entitled to relief against an assessment made on account of his bank stock on the theory that he was not entitled to have considered in connection therewith a deduction on account of debts, although it was allowed in respect to other personal property. *There was no proof and no suggestion of the necessity for proof of the existence of such other moneyed capital.*

In *Evansville Bank vs. Britton*, 105 U. S. 322, relief was granted to shareholders claiming the right to have debts deducted in the valuation of their shares of stock, although the statute provided for such deduction only in respect to credits. The court say:

[105 U. S. 324] "It is unnecessary to repeat the argument in *People vs. Weaver* (100 U. S. 539) on this point. We are of opinion that the taxation of bank shares by the Indiana statute, without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress."

If in the case at bar it were necessary to offer proof of the existence of competing moneyed capital, then it would have

been necessary in the *Evansville Bank case* to prove the existence of credits or money at interest and other demands against persons and bodies corporate constituting competing moneyed capital before any relief would be granted giving to national bank shareholders the same right of offset given in respect to such other moneyed capital. *The effect of the decision is to hold that so far as the limitation on the right of offset is concerned, the statute was void on its face. There was no necessity for proof.*

In *Whitbeck vs. Mercantile Bank* (1887), 127 U. S. 193, it was held that there was a discrimination forbidden by Section 5219 in the valuation and taxation of bank stock at a higher rate than that laid upon other moneyed capital and also in that while the statutes permitted a taxpayer owning moneyed capital subject to taxation to make a deduction from the amount assessed against him on account of credits of the amount of his bona fide indebtedness, no such provision was made in regard to the indebtedness of any holder of bank stock. There was no evidence as to the amount of such other moneyed capital or as to its character or use. In so far as the particular objections are concerned the effect of the decision is to hold that a statute imposing a higher rate on bank stock than on other moneyed capital or denying a deduction for indebtedness in the assessment of bank stock while granting it in respect to other moneyed capital, is void on its face because in violation of the permissive statute.

That this is the effect of the decision in *Whitbeck vs. Mercantile National Bank of Cleveland* was expressly recognized in *National Bank of Wellington vs. Chapman*, 173 U. S. 205, at 219.

In *National Bank of Wellington vs. Chapman* (1898), 173 U. S. 205, the principal objection made had reference to permitting an offset of indebtedness against credits when no corresponding offset was allowed against shares of stock in national banks. However, as appears from the copies thereof

set up in the margin (173 U. S. 205, at pp. 209 to 213), the statutes involved contained a limited statutory definition of credits not reaching all the moneyed capital in the state, and therefore of necessity including credits which would not answer to the description of moneyed capital. It was a case of an attack on the tax, not on the ground of a general discrimination in favor of all other moneyed capital, but of a particular and limited discrimination in favor of a part only of a particular kind of moneyed capital. It is an instance of a law taxing bank stock and other moneyed capital but exempting a part of other moneyed capital and presenting an issue of fact as to whether so much of other moneyed capital was exempted that the result was to tax the aggregate of other moneyed capital at a lower rate. Grant that this presents an issue of fact, and grant that the issue requires proof. It has no bearing in a case where, as here, we have, not a law which, while taxing other moneyed capital generally, exempts a particular kind of other moneyed capital, but a law which in general leaves other moneyed capital wholly untaxed—so far as ad valorem taxation is concerned.

The case of *Amoskeag Savings Bank vs. Purdy* (1913), 231 U. S. 373, arose on certiorari. The objection to the tax was that the shareholder was not allowed to offset debts against the valuation of bank stock holdings, although there was such right of offset in respect to other moneyed capital. The distinguishing feature between that case and *People vs. Weaver*, 100 U. S. 539, is that, while in the *Weaver* case the tax assessed on bank stock was on the basis of the same method of valuation and the same rate of assessment as personal property in general, including other moneyed capital, but without allowance for the indebtedness of the taxpayer, although such allowance was made to the owners of personal property in general, including other moneyed capital, the law in the latter case was materially different. In the *Amoskeag* case other moneyed capital was dealt with for the purposes of taxation by one method and bank stock by another.

Where, as in the *Weaver case*, the two classes of property were dealt with so far as valuation and rate are concerned by the same method, *the deduction of indebtedness from other moneyed capital while it was denied in respect to bank stock necessarily resulted in a forbidden discrimination*. Where, however, as in the *Amoskeag case*, two entirely different methods were employed, refusing to permit the deduction would not necessarily result in a discrimination forbidden by the statute, *since even without the deduction bank stock might still be assessed and taxed as low as or at a lower rate than other moneyed capital*. In the former case no proof would be required. In the latter case proof would be required. Thus it follows that the *Amoskeag case* presents an instance of a claim that the Act of Congress is violated by a law taxing national bank stock by one method and other moneyed capital by another method, which might properly be held to present an issue of fact as to whether discrimination actually results in the operation of the law.

In *Covington vs. First National Bank* (1904), 198 U. S. 100, there is no reference to the amount of moneyed capital involved or as to its competitive character.

The same is true of *Citizens National Bank vs. Kentucky* (1909), 217 U. S. 443.

In *Eddy vs. First National Bank of Fargo* (Circuit Court of Appeals, Eighth Circuit, 1921), C. C. A., 275 Fed. 550, the court recognized the difference between the discrimination resulting from a partial exemption of and a total failure to tax other moneyed capital and, while the decision was not based on that ground, it quite clearly indicated that it would take judicial notice of the existence of a substantial amount of moneyed capital held by citizens of North Dakota not invested in shares of state and national banking associations.

Cases dealing with partial exemption have no weight in opposition to the foregoing. These cases may be divided into three groups comprised of (a) exemptions to further a

policy, (b) exemptions of moneyed capital deemed unsubstantial in amount, and (c) exemptions of personal property held not to be moneyed capital.

(a) Congress did not intend to deprive the state of the right to exempt particular kinds of property from taxation to further a policy and therefore such exemptions reasonable in amount are not in violation of Section 5219.

In *Davenport Bank vs. Davenport Board of Equalization*, 123 U. S. 83, it was pointed out that savings banks were exempted from taxation. The court held that this exemption was to encourage saving and did not show a violation of Sec. 5219. The reason for the exception to the general rule is well stated in *Adams vs. Nashville*, 95 U. S. 19, a case in which certain municipal bonds of the city of Nashville were exempted from taxation. Said the court:

"It [the act of Congress] was not intended to cut off the power to exempt particular kinds of property, if the legislature chose to do so. Homesteads, to a specified value, a certain amount of household furniture (the six plates, six knives and forks, six teacups and saucers, of the old statutes), the property of clergymen to some extent, schoolhouses, academies and libraries are generally exempt from taxation. The discretionary power of the legislatures of the states over all these subjects remains as it was before the act of Congress of June, 1864."

Other cases dealing with the rule as to reasonable exemptions to further a policy are:

Mercantile Bank vs. New York, 121 U. S. 138.

(Savings banks exempted.)

Bank of Redemption vs. Boston, 125 U. S. 60.

(Savings banks exempted.)

(b) Exemptions deemed so unsubstantial in amount as not reasonably to warrant a conclusion that the other moneyed capital of the federal statute is exempt, do not void the tax as to national bank stock.

In *Mercantile Bank vs. New York*, 121 U. S. 138, the court expressed the reason for the rule when it said:

[121 U. S. 138, at 151] "It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt."

Exemption of an immaterial amount of moneyed capital from taxation, moneyed capital in general being taxed, does not show a violation of Section 5219.

In *Hepburn vs. School Directors*, 23 Wall. 480, the question was whether an owner of national bank shares residing in Cumberland county, Pennsylvania, was exempt from a local tax by reason of a statutory exemption from all taxation in that county, except for state purposes, of mortgages, judgments, recognizances, and money owing upon articles of agreement for the sale of real estate, except mortgages, judgments and articles of agreement given by corporations. The value of such securities held by individual citizens did not appear. Said the court:

[23 Wall. 480, at 485] "This is a *partial exemption only*. It was evidently intended to prevent a double burden by the taxation, both of property and debts secured upon it. *Necessarily, there may be other moneyed capital in the locality than such as is exempt*. If there is, moneyed capital, as such, is not exempt. Some part of it only is. *It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt*. Certainly there is no presumption in favor of such an intention. To have effect it must be manifest. The affirmative of the proposition rests upon him who asserts it. In this case it has not been made to appear." (Italics ours).

In *Boyer vs. Boyer*, 113 U. S. 689, the court said with reference to the last mentioned case:

[113 U. S. 689, at 693] "That case is authority for the proposition that a *partial exemption* by a state, for local

purposes, of moneyed capital in the hands of individual citizens does not, of itself and without reference to the aggregate amount of moneyed capital not so exempted, establish the right to a similar exemption in favor of national bank shares held by persons within the same jurisdiction. *But it is by no means an authority for the broad proposition that national bank shares may be subjected to local taxation where a very material part, relatively of other moneyed capital in the hands of individual citizens, within the same jurisdiction or taxing district, is exempted from such taxation.*" (Italics ours).

These cases involve no departure from the general rule. Exemptions immaterial in amount do not, where all other moneyed capital is taxed, show an intent to violate Section 5219.

Where, while the exemption is partial, the amount of moneyed capital exempted is comparatively large, the court may be faced with a further question whether in proportion to the whole mass of moneyed capital that exempted is so substantial in amount as reasonably to furnish the basis for a conclusion that the other moneyed capital of the federal statute as a whole is not taxed at the same rate as shares of stock in national banks. It is always recognized that "cases will arise in which it will be difficult to determine whether the exemption of a particular part of moneyed capital in individual hands is so serious or material as to infringe the rule of substantial equality."

Boyer vs. Boyer, 113 U. S. 689, at 702.

As stated in *People ex rel. Hanover National Bank vs. Goldfogle, et al.*, 234 N. Y. 345:

[234 N. Y. 345] "In doubtful cases the burden may rest on the bank to establish inequality. *National Bank of Commerce vs. Seattle*, 166 U. S. 463; *First National Bank of Wellington vs. Chapman*, 173 U. S. 205."

Discussions dealing with the necessity for proof in the case of partial exemption will be found in the following cases :

National Bank of Wellington vs. Chapman, 173 U. S. 205;

Bank of Garnett vs. Ayers, 160 U. S. 660;

Aberdeen Bank vs. Chehalis County, 166 U. S. 440;

Commercial Bank vs. Chambers, 182 U. S. 556.

In *Boyer vs. Boyer* (1884), 113 U. S. 689, it is recognized that even where the exemption is partial only, the discrimination may be so apparent and substantial on the face of the statute as to enable the court to say that other moneyed capital is not taxed at the same rate as shares of stock in national banks, and that therefore the provision for the tax on such shares of stock is void.

(c) Exemptions of personal property held not to be moneyed capital call for no extended discussion at this point. The moment any class of property is determined not to be moneyed capital, it becomes unnecessary to consider it on the question as to whether the law is invalid on its face.

IV.

UNDISPUTED EVIDENCE SHOWS EXISTENCE IN WISCONSIN OF A LARGE AND SUBSTANTIAL AMOUNT OF OTHER MONEYED CAPITAL COMING INTO COMPETITION WITH NATIONAL BANKS, WHICH MONEYED CAPITAL IS WHOLLY EXEMPTED FROM TAXATION.

The trial court found the existence of large and substantial amounts of competing moneyed capital in the hands of individual citizens that were wholly exempted from taxation (R. 18).

The Supreme Court stated that they did not consider themselves "concluded as in an ordinary case by the findings of

fact made by the trial court, not only because the findings are general in their terms and present matters which are mixed questions of law and fact, but for the further reason that the law under consideration is one of state-wide application. The court is required to take judicial notice of the general conditions to which the law applies" (R. 76). The Supreme Court also held that the law was "either valid in toto or void in toto. Its validity cannot be made dependent upon a particular finding of fact relating to the conditions in a single locality so that, assuming it to be administered as written, the law might be held valid in one place, void in another, or valid at one time and void at another." (R. 76).

The court also announced the view that the income tax was not an equivalent or substitute for the ad valorem tax levied on stock of national banking associations (R. 76).

Taking up the question as to whether shares of stock in national banking associations were assessed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens, the court said:

"If Section 5219 as amended were presented without interpretation by the Supreme Court of the United States we should have no difficulty in affirming the judgment of the trial court, for the reason that there are many businesses in which 'moneyed capital in the hands of individual citizens' is exempt from ad valorem taxation and the income derived therefrom is taxed, which income tax is in lieu of other taxes." (R. 73).

Discussing the change to the income tax system in 1911, the court quoted from the opinion rendered in the first suit testing the validity of that law to the effect that thereby personal property taxation for all practical purposes became a thing of the past. "The specific exemptions of all money and credits and the great bulk of stocks and bonds, as well as of all farm machinery, tools, wearing apparel, and household furniture in actual use, regardless of value, goes far

to eliminate taxation of personal property; while the provision that he who pays personal property taxes may have the amount so paid credited on his income tax for the year seems to put an end to any effective taxation of personal property." (R. 74, quoting from *Income Tax Cases*, 148 Wis. 456, at 503).

Continuing, the court stated that the legislature undertook to classify moneyed capital so as to bring all moneyed capital in competition with moneyed capital invested in shares of national banks into one class and did this by providing that all banking companies be taxed on the ad valorem basis, the legislature having theretofore defined banking and restricted the conduct of banking business to incorporated banks. At this point the court quoted Section 2024-78l, Wis. Stats. 1921, and cited Section 2024-78m and the case of *MacLaren vs. State*, 141 Wis. 577, to the proposition that "since the enactment of that law, the banking business of the state has been strictly confined to national banks and corporations organized under the banking laws of the state." (R. 75). An examination of the statutes and the case just cited will demonstrate that the statutes in question are aimed at *banks of deposit* and not at banks of discount. There is nothing to prevent an individual, partnership or non-banking corporation from carrying on all the business commonly carried on by a bank of discount and employing any amount of moneyed capital in that business.

The court then took up the decisions of this court with a view to indicating its understanding as to the extent to which the meaning of the phrase "other moneyed capital in the hands of individual citizens" had been here limited (R. 77) and quoted at some length from a number of decisions commencing with *Mercantile Bank vs. New York*, 121 U. S. 138, and ending with *Merchants' National Bank vs. Richmond*, 256 U. S. 635. In discussing the last mentioned case the court say:

"There is nothing in the published report to indicate whether the bonds, notes and other evidences of indebtedness aggregating \$6,250,000, are held by private banks or other persons. We find nothing in the laws of the state of Virginia which restricts the business of banking to corporations organized under the laws of that state or of the United States and it is asserted in the briefs of counsel that there are in fact a number of private banking institutions within the city of Richmond. Nor is there anything in the published report to indicate definitely what is meant by competition. If the rule laid down in the *Aberdeen Bank* case is adhered to, it must mean something more than the mere fact that citizens of the state are loaning to each other, for there the allegation of the bill was that \$14,000,000 was invested in loans and securities by the citizens of the state of Washington and to them payable and owing by other citizens of said state." (R. 84). (Italics ours).

The inference from this would be that the majority of the court assumed that this court had before it in the record in the *Richmond* case some proof that these bonds, notes and other evidences of indebtedness were in the hands of private bankers.

The court then took up the definition of the word "competition", saying: "As the word is used in the decisions referred to it undoubtedly means that if there is any material amount of moneyed capital engaged in a business which bids against national banks for the business which they are authorized to do, competition exists." (R. 85). (Italics ours.)

The conclusion is then drawn that there are no concerns or individuals in the state engaged in enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money, except banks (R. 86); that building and loan associations cannot be regarded as in competition with

national banks (R. 86); that brokers and dealers in bonds, mortgages and securities are not in competition because national banks are not authorized to carry on the same business (R. 86); that acceptance companies are not to be considered because there is a wide gap between the securities in which they may deal and the ordinary commercial paper accepted by banks in the usual course of their business (R. 87); and that although it "appears from the evidence and is a fact known to everyone that in the state of Wisconsin there are many individuals who loan their own money upon real estate mortgages, bonds and other interest bearing securities in lieu of depositing the same in banks or investing in stocks or other forms of investment," they cannot be regarded as in competition with national banks (R. 88).

This opinion was concurred in by four members of the court. Three members of the court joined in a very vigorous dissent by the chief justice, in the course of which he says that the undisputed evidence shows that there is such competition (R. 91); that this evidence is in accordance with facts generally known to exist in the banking and loaning business, a condition obtaining throughout the state (R. 92); that "it may be safely said that in larger cities the amount of money loaned by loaning companies in all probability exceeds the amount per capita in the smaller cities" (R. 92); and that it is a well known fact that in Wisconsin there are numerous private individuals, partnerships and corporations that can and do engage in the business of discounting commercial paper, making loans of money on collateral security, and negotiating loans, dealing in bonds, etc., which is stated in *Mercantile Bank vs. New York*, 121 U. S. 139, to be a part of the legitimate business of a national bank (R. 94).

A.

THE EVIDENCE ON COMPETING CAPITAL IS UNDISPUTED.

The city called four witnesses:—Mr. William Radke, the city clerk (R. 59), Mr. E. W. Sawyer, one of the plaintiff's

attorneys, who happened to be a director of the Hartford High school (R. 61), Mr. Charles Friday, an officer of the Hartford High school (R. 62), and Mr. John G. Liver, the president of the bank (R. 64). All of this testimony related to the levy of taxes and to sales of stock of the First National Bank of Hartford as bearing, we assume, on valuation, but made no attempt to controvert the evidence going to show the existence of competing capital. So far as this issue is concerned, the case is therefore before the court on undisputed evidence.

B.

THE STATE SUPREME COURT'S DECISION BEING BASED NOT ON EVIDENCE BUT ON JUDICIAL NOTICE AND THEIR VIEWS OF THE LAW, THIS COURT MUST PASS ON THE QUESTION OF FACT FOR THEMSELVES, DECIDING FOR THEMSELVES WHAT ARE MATTERS OF COMMON KNOWLEDGE AND WHAT IS THE LAW APPLICABLE TO THE SITUATION.

The trial court made a clear and definite finding of a very large amount of moneyed capital both in the city and in the state entering into competition with the banking business, including that of the plaintiff, which under the statute is wholly exempt. The Supreme Court brushed aside the finding of the trial court as being based on a misunderstanding of the law and directly contrary to matters of common knowledge. The Supreme Court point to nothing either in the trial judge's memorandum decision (R. 16) or in the findings of fact or in the conclusions of law (R. 17 to 19) which indicates a misconception or misunderstanding of the law. If this court upon examination of the opinions shall find that the majority of the Supreme Court of Wisconsin misunderstood and misapplied the decisions of this court, or shall find that the evidence is not in conflict with matters which are of common knowledge to the members of this court, then there can be no room for any argument to the effect that

conclusions of the State Supreme Court on that subject are in any measure controlling.

Merchants' National Bank vs. Richmond, 256 U. S. 635, at 638.

Carlson vs. Curtiss, 234 U. S. 103, at 106.

In considering the effect to be given to the decision of the Supreme Court of Wisconsin on the question of fact, it is to be borne in mind that under the law of Wisconsin the State Supreme Court is bound by the findings of the lower court wherever the findings are supported by credible evidence. They cannot be disturbed unless they are contrary to the clear preponderance of the evidence.

McMynn vs. Peterson, 186 Wis. 442, 469.

Hayton vs. Appleton Machine Co., 179 Wis. 597, at 601.

The opinion of the Supreme Court of the State of Wisconsin should be read and interpreted with this rule of procedure in mind. If the Supreme Court of Wisconsin had correctly interpreted the decisions of this court dealing with Section 5219, the finding of the trial court would not have been disturbed. That it did misunderstand the decisions of this court, we shall presently point out.

The State Supreme Court's view of the law colors its conclusion on this question, and if that view of the law be erroneous in any particular, no presumption may be indulged as to what the conclusion would have been but for such error.

Here the federal right is basic and dominates the case. In determining whether a federal right has been wrongly denied this court may go behind the finding to see whether it is without substantial support. "If the rule were otherwise, it almost always would be within the power of a state practically to prevent a review here".

Truax vs. Corrigan, 257 U. S. 312, at 324.

This court will review the findings of fact by a state court (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so mingled as to make it necessary in order to pass upon the federal question to analyze the facts.

Northern Pacific Railroad Co. vs. North Dakota,
236 U. S. 585, 593.

Truax vs. Corrigan, 257 U. S. 312, 325.

Kansas City Southern Railway vs. Albers Commission Co., 223 U. S. 573, 591.

Cedar Rapids Gas Co. vs. Cedar Rapids, 223 U. S.
655, 668.

Mackay vs. Dillon, 4 Howard 421, 447.

Aetna Life Ins. Co. vs. Dunken, 266 U. S. 389, 394.

Again, the State Supreme Court's decision is based upon the proposition that the evidence is contrary to matters of common knowledge. Of course, those things which are matters of common knowledge are not required to be proven. That is on the theory that they are known to all persons. Whether the existence or non-existence of competing capital in Wisconsin is a matter of common knowledge or not is clearly demonstrated by the manner in which the members of the Supreme Court of the state divided on the question. While four members of the court stated that it was a matter of common knowledge that there was no competing moneyed capital in the state, three members of the court not only took the view that the evidence was sufficient to support a finding on the existence of moneyed capital but took the further view that it was a matter of common knowledge that there was such moneyed capital within the state. It could hardly be claimed that anything was a matter of common knowledge when three out of every seven persons would declare the fact to be the other way. If the seven members of the Supreme Court of the State of Wisconsin divide on

the question in this manner, it may fairly be assumed that the opinion of the minority represents the views of three out of every seven persons of a high order of intelligence in the state.

Brown vs. Piper, 91 U. S. 37, 42.

Again, we submit that nothing can be a matter of common knowledge to the members of the Supreme Court of Wisconsin which is not also a matter of common knowledge to the members of this court. This court can never permit a declaration of a state supreme court as to what is a matter of common knowledge to be controlling on any question of fact involved in a claim of violation of a federal right, whether under federal statute or under the federal constitution. To do so is to abdicate the power and duty finally to adjudicate on all federal questions.

Yates vs. Milwaukee, 77 U. S. (10 Wall.) 497, 505.

Minnesota vs. Barber, 136 U. S. 313, 321.

C.

THE EVIDENCE CONCLUSIVELY ESTABLISHES THE EXISTENCE OF COMPETING MONEYED CAPITAL AS DEFINED BY THIS COURT.

There are no *unincorporated* banks of deposit in Wisconsin, and, of course, there is no discrimination in favor of any such *incorporated* banks. There is nothing in the laws of Wisconsin, however, restricting to incorporated banks (1) the conduct of the business of banks of discount, (2) the employing of moneyed capital substantially as in the loan and investment features of banking, or (3) the employing of moneyed capital in making investments by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment.

The undisputed evidence establishes the conduct of such business and the employment of moneyed capital in large amounts in the manner indicated. All moneyed capital so

employed being wholly untaxed, any tax on shares of stock in national banks is necessarily in contravention of Section 5219.

First National Bank vs. Anderson, ... U. S. ...,
46 Sup. Ct. 135.

Wisconsin is an income tax state. There is no taxation whatever of other moneyed capital under the ad valorem system and hence no assessment rolls are available as would be the case if there were, not a total exemption, but merely a discrimination in rate. The evidence necessarily takes a form differing from that commonly met with in such cases as the *Richmond case*. While it differs in form, it goes far beyond that in the *Richmond case* or in any other case this court has had occasion to consider.

No new rule was announced in *Merchants' National Bank vs. Richmond*, 256 U. S. 635, as to the meaning of the words "moneyed capital" in connection with Section 5219. Nor did Congress in the re-enactment of that section on March 4, 1923, do more than to put into express words what was implied before.

First National Bank vs. Anderson, ... U. S. ...,
46 Sup. Ct. 135.

Section 5219 is to be read in the light of the purpose to protect these fiscal agencies of the national government against burdens which would "prevent the capital of individuals from freely seeking investment" therein, or which "would diminish their value as an investment and drive capital so invested from this employment."

Mercantile Bank vs. New York, 121 U. S. 138, 154,
155;

Amoskeag Savings Bank vs. Purdy, 231 U. S. 373,
390.

In other words, national banks are thus protected against competition for capital. In the last analysis, that is the whole purpose, since the ultimate result of competition is

the discouragement of the organization or continued existence of national banks. It is undisputed that in this respect state and national banks in Wisconsin face competition for capital in the form of investments exceeding many times their combined capital (R. 48, 49). A man with \$10,000 to invest would have to face in a single year a tax of \$300 if he invested in stock of the plaintiff bank against a tax of \$17 or \$18 if he put the money out at interest with a purpose to keep it so employed (R. 45, 46).

In *Merchants' National Bank vs. Richmond*, 256 U. S. 635, the evidence showed national bank stocks aggregating \$8,000,000, stocks of state banks and trust companies of the value of \$6,000,000, and bonds, notes and other evidences of indebtedness aggregating \$6,250,000. The court said:

"It is to be *inferred* that a substantial part of this aggregate was in the hands of individual taxpayers; the precise amount does not appear. It also was shown by evidence without dispute that moneyed capital in the hands of individuals invested in bonds, notes, and other evidences of indebtedness comes into competition with the national banks in the loan market." (Italics ours.)

Under the evidence in the case at bar it is not necessary to resort to any inference and here also it is shown by evidence without dispute that moneyed capital of this character comes into competition with national banks in the loan market. The evidence shows the loaning out to individuals by real estate firms of \$250,000 or \$300,000 annually (R. 27), the sale in the state by a single concern of 90% of \$25,000,000 in a single year (R. 46), money invested in bonds and other investments and securities running into millions, a substantial portion of which is held by individuals (R. 48, 49), bonds and other investments many times exceeding that invested in national and state banks (R. 49), mortgages recorded in the county running in a single year to over \$1,500,000 (R. 57), and outstanding mortgages sold to individuals by one dealer in Hartford amounting to \$500,000. The

evidence also shows that these loaning concerns competed with the business of national banks the same as any other bank would (R. 27), that the withdrawal of funds for loans reduced deposits and directly affected the Bank's loaning department (R. 28, 29), that bond investments resulted in competition for capital (R. 48), and that investment houses came into competition with loans, especially short time loans (R. 49).

In contrast to this testimony we find from an examination of the record in the *Richmond case* (p. 47 of that record) that the only testimony on competition was that of the vice-president of the bank, who, after testifying generally that moneyed capital in the hands of individuals invested in bonds, notes and other evidences of debt came into competition with national banks, on being asked how this was, stated:

"Our assets are invested in bonds, notes and other evidences of debt. The loan of money or the extension of credit is simply regulated, or largely regulated, by supply and demand. The more money there is to be loaned by individuals or corporations, the natural tendency is for a lower rate that a bank can get on a similar investment. In other words, the greater the competition, the lower the rate; the greater the demand, the higher the rate.

"Q. Do the national banks lend money on notes secured by real estate?

"A. Yes, they would take a note as collateral for another loan. Very often the loan would be paid off because of the fact that the collateral was taken up by the borrower and then the banks have to seek other channels for investment of their funds."

On this subject the *Richmond case* cannot be distinguished. We have referred at this point to a part only of the evidence on competition. It is set out fully in the statement of facts at pages 3 to 19 supra. The evidence is in no sense

of the word meager. It is not only undisputed but, read in the light of matters of common knowledge, is incontrovertible. The facts bearing on the question of competition were conclusively established.

Merchants' National Bank vs. Richmond, 256 U. S. 635;

First National Bank vs. Anderson, U. S., 46 Sup. Ct. 135, 138.

We have stated above that there are no banks of deposit in Wisconsin. That is true in the technical sense of the word; and yet under the laws of Wisconsin it is possible for financial corporations other than banking corporations to carry on transactions which in the last analysis are of the same general character. Mr. Liver said that the Bank deals in bonds of organizations like the Wisconsin Farm Loan Association, which it buys for its own investments and to accommodate its clients, many of which are disposed of to individual clients (R. 26). At page 63 *infra* we have quoted the material portions of the Wisconsin statutes relating to the organization and supervision of the business of land mortgage associations. Under Section 2024-112 (Wis. Stats. 1921), land mortgage associations are given the power to make loans on first mortgages. They are also given the power to issue bonds and to secure the bonds so issued by the pledge of notes and mortgages taken. This means that such an association may have bonds outstanding far in excess of its original capital. The money raised by the issue of bonds secured by the pledge of notes and mortgages is reinvested and there is no limitation upon the extent to which this may be carried other than that involved in the restriction as to the percentage of value to which they may loan. This is not technically the receiving of deposits; and yet these operations are of a similar character and present the clearest and most conclusive form of competition.

It goes without saying that these organizations present competition also in the loan and investment market.

The testimony of Mr. Liver, president of the Bank, and of Mr. Schauer, secretary and treasurer of the Hartford Building & Loan Association, at pages 9 and 10 supra, clearly shows that in practical effect building and loan associations likewise present effective competition for deposits. We do not mean that the building and loan associations receive deposits in the technical sense of the word; and yet the manner in which they conduct their business clearly shows that the stockholders have substantially the same rights as holders of certificates of deposit. They have, it is true, some broader rights. But the building and loan association, in the receiving and handling of the great mass of its funds, operates so nearly in the same manner as does the bank in the receiving of deposits that it presents competition just as clearly as would another bank of deposit. The capital stock of the plaintiff Bank in this City of 4,000 is \$50,000. On December 31, 1921 this building and loan association had outstanding paid up stock amounting to \$77,502.71, and installment stock amounting to \$43,691.85, a total of \$121,194.06 (R. 55).

The undisputed evidence shows that there are, both in the City and in the State, competing financial enterprises. Some of these are corporations and some are partnerships, the shareholders or members of which are residents of Wisconsin (R. 50, 51). All of these clearly present competition for capital. We can easily understand how a man wishing to invest his money in a corporation or firm whose only capital would be money and whose only business would be the making of profit by its use as money might well choose to buy stock in an investment house in Wisconsin rather than to buy stock in a national bank. He would know that the dividends on his stock in a financial corporation would be exempt from tax in his hands, if he were a resident of Wisconsin, and that the taxes of the company would be measured by its income.

We might have a financial corporation and a national bank the aggregate values of the stock of which were identical. If both sustained a loss in any given year, the one would pay no tax, while the shareholders of the other would pay a very substantial tax. If both earned a net income, while both would pay taxes, the ad valorem bank stock tax would be certain to be many times the income tax paid by the other corporation.

Moneyed capital is also brought into competition where it is employed "substantially as in the loan and investment features of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment."

First National Bank vs. Anderson, — U. S., —, 46 Sup. Ct. 135, at 138.

As applied to notes, bonds or other securities in the hands of individuals and employed, not in any business, but in the making of investments by way of loan, discount or otherwise with a view to sale or repayment and reinvestment, it reaches capital in the form of money which may be invested and employed by individual citizens "in many single and separate operations forming substantial parts of the banking business".

Mercantile Bank vs. New York, 121 U. S. 138, at 155.

To determine whether stock in non-banking corporations constitutes competing moneyed capital, we inquire whether the capital of the corporation is money and the object of its business is the making of profit by its use as money (*Mercantile Bank vs. New York*, 121 U. S. 138, at 157). To apply the latter test we inquire whether the capital is invested in securities by way of loan, discount or otherwise which from time to time according to the rules of business are reduced again to money and reinvested (*ibid.* 121 U. S. 157). If this be the business of a corporation or other association, then its shares of stock or the capital interests therein are moneyed

capital. To illustrate the application of that test, it excludes stock in mining, railroad, insurance and other mercantile corporations (*Talbott vs. Silver Bow County*, 139 U. S. 438, at 447, 448).

Its application here requires holding shares of stock and other capital interests in the many instances of financial enterprises, corporate and individual, shown to be in active business to be competing moneyed capital.

When the law was amended in 1868, the holding of corporate stock *by corporations*, as well as individuals, was seldom met with. Bank stock was a form of moneyed capital—but only *one* form. Discrimination in favor of any other form which might become competing was forbidden. We have just considered the test in dealing with corporate stocks. When we pass from corporate stocks to bonds, notes and other evidences of indebtedness, we immediately encounter money “at interest”, all of which is potentially competing. Two men may hold bonds or notes of the same identical issue and yet theoretically these may be competing capital in the hands of one and not in the hands of the other. The test now is not the character of the property. Neither is it the business of the holder. It is the nature of its employment. It is not essential that it be employed in a business or in operations amounting to a business in direct competition with national banks. If we look upon the Act of March 4, 1923, c. 267, 42 Stats. 1499, as a codification of the decisions of this court, we must exclude “bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking *or* investment business *and* representing merely personal investments *not* made in competition with such business”. Given a man engaged in the banking *or* investment business, all the moneyed capital he employs therein is competing moneyed capital. But even though a man be not engaged or employed in the banking or investment business, it is only that portion of his bonds, notes and

other evidences of indebtedness "representing merely personal investments *not* made in competition" with such business that are excluded. All the remainder must be looked upon as competing moneyed capital. As this act made no change in the law, the rule as to the sufficiency of the evidence remains the same as in the *Richmond case*. In that case the evidence showed a substantial amount of bonds, notes and other evidences of indebtedness. The court properly *inferred* that a substantial portion was in the hands of individuals and the testimony showed that it came into competition in the loan market. Neither through tax rolls or otherwise can these credits of individuals be classified as competing and non-competing. If that be a matter for proof, it must be one to be proven in a practical manner. It must be proven by the testimony of men familiar with general financial conditions and financial operations in the community or the state. The proof in this case shows competition, not merely in the loan market, as in the *Richmond case*, but in the investment market, in the field of deposits (in the practical rather than in the technical sense), and in nearly every field of banking.

It has always been held that moneyed capital includes private investments not used in the banking business. In the first case which arose under the Act of February 10, 1868, *Hepburn vs. School Directors* (1874), 23 Wall. 480, it was assumed by court and counsel that *the primary meaning of the words "moneyed capital" is money at interest*. In that case Hepburn held 60 shares of stock in a national bank of the par value of \$100 per share. He was assessed thereon at a valuation of \$150 per share. It was argued in effect that if a man loans \$100 on a note, that constitutes moneyed capital of the value of \$100, and that if he subscribes for \$100 worth of stock in a national bank, that stock represents only \$100 of moneyed capital, without regard to what the real value

of the stock may happen to be. In answer to that the court said:

[23 Wall. 483] "It is contended that the term 'moneyed capital', as here used, signifies *money put out at interest*, and that as such capital is not taxed upon more than its par or nominal value, the par value of these shares is their maximum taxable value. (*Italics ours.*)

"We cannot concede that money at interest is the only moneyed capital included in that term as here used by Congress. The words are 'other moneyed capital'. That certainly makes stock in these banks moneyed capital, and would seem to indicate that other investments in stocks and securities might be included in that descriptive term."

With particular reference to the argument that a hundred dollar share of stock represented only a hundred dollar investment of moneyed capital, the court answered:

[23 Wall. 484] "The available moneyed capital belonging to a bank may be diminished by losses or increased by accumulated profits. Therefore some plan must be devised to ascertain what amount of money at interest is actually represented by a share of stock."

Court and counsel assumed that *its primary meaning was money put out at interest*, but reasoned that Congress must have meant something more than that—something more and not something less. That was because the use of the word "other" necessarily indicated that shares of stock in national banks must be deemed moneyed capital, and from this it must follow that the words "moneyed capital" might indicate investments in stocks and securities not commonly answering to the description "money at interest". That primary meaning of the words "moneyed capital" was never lost sight of, and it is that that is recognized in *Merchants' National Bank vs. Richmond*, 256 U. S. 635.

The application of the same general principle required the definite inclusion of farm mortgages as competing capital once the prohibition against loaning on farm mortgages by national banks was withdrawn and that field opened to them.

First National Bank vs. Anderson, — U. S. —, 46
Sup. Ct. 135, 140.

There was no evidence in the *Richmond case* to the effect that the competing moneyed capital on which the decision turned was employed in business. A substantial part was inferred to be in the hands of individual taxpayers. It was also shown by evidence "that moneyed capital *in the hands of individuals invested in bonds, notes, and other evidences of indebtedness*" came into competition with the national banks "in the loan market". Actual *business rivalry* has never been the essence of this court's decisions. On the contrary, it has been repeatedly recognized that moneyed capital is brought within the rule by indirectly coming into competition with the business of national banks and the law of supply and demand in the loan and investment markets. Such competition from whatever source under the law of supply and demand vitally affects the main business of national banks, which is the loaning of money. Similarly, the greater the competition in the investment market for securities for the payment of money at interest, the higher the market prices become for such moneyed capital, and as the demand for these securities decreases the market values also go lower. Competition in the investment market under the law of supply and demand also affects the rates of interest obtainable by national banks upon loans. Every investment in a corporate bond or note is in reality participation in a loan to the issuing corporation, and corporations obtaining funds in this manner remove the necessity of their accepting any less favorable terms which national banks might offer.

It is and for years has been common practice in meeting needs of industrial and other corporations to issue unsecured notes or debentures under trust agreements containing covenants on the part of the issuing corporations for the protection of the note or debenture holders upon a breach of which such remedies as a judgment by confession and a receivership for the benefit of all the noteholders are available. These in the last analysis represent just so much unsecured commercial paper. They are often issued with varying maturities. Banks and individuals alike become investors in these securities. In other words, banks and individuals alike compete for this business. It is a common practice under collateral trust agreements to issue bonds or notes, the security back of which is not real estate but collateral of the same kind which is ordinarily taken by banks. These are sold to banks and to individuals alike. An industrial corporation having need, let us say, of \$500,000, puts out one of these issues, and, with the proceeds of that issue, takes up the major portion of its bank loans. We say this is a matter of common knowledge. Financing is being done more and more by the investing public and the investing public are more and more becoming competitors of national banks.

This competition which banks must meet from corporations going into the investment market to obtain funds becomes so severe at times as to result in the taking up of existing bank loans with funds thus secured by the debtor corporations through the issuance of new securities in the open market, which are largely absorbed by the public generally. How this is being done in Wisconsin is apparent from the testimony of Mr. Grove, which is abstracted in the statement of facts.

Direct competition in the investment market between national banks, and persons and corporations generally, who employ their surplus funds therein, is too substantial and commonly known to be ignored.

It appears from the 1924 Annual Report of the Comptroller of the Currency (p. 44) that approximately one-third (1/3) of the investments of national banks consists of railroad, public service corporation, and other bonds and collateral, trust and other corporation notes.

See Appendix F.

As we understand it, judicial notice may be taken of this report.

Tempel vs. United States, 248 U. S. 121, 130.

Heath vs. Wallace, 138 U. S. 573, 584.

The comptroller of the currency has never disapproved of such investments by national banks, which would be the natural thing if these were *ultra vires*. It was stated in his 1924 Report (p. 12) that "a great number of national banks now buy and sell investment securities, and the office of the comptroller has raised no objection because this has become a recognized service which a bank must render".

The sanction of the law to the well-known practice of national banks to invest their funds in corporate bonds and notes is contained in Section 5136, Subdivision 7 of the National Bank Act under which they are given the power to carry on the business of banking among other things "by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt".

The reasoning of the opinion in *Newport National Bank vs. Board of Education*, 114 Ky. 87, 70 S. W. 186, on the subject of the express statutory power of national banks to invest their funds in corporate bonds is, we respectfully submit, unanswerable.

At this point we have drawn verbatim largely from a brief lately presented to the Court of Appeals of the State of New York by Mr. Martin Saxe of the City of New York.

To summarize the evidence on competition, it shows that the Bank meets competition from individuals and concerns engaged in selling notes, mortgages, securities and bonds (R.

26, 27, 28, 47, 49, 50, 57), from individuals and concerns engaged in the loan business (R. 27, 30, 39, 57, 65), from real estate firms in the loaning business (R. 27, 30), that these loaning concerns compete as do other banks (R. 27), that this competition reduces the Bank's loaning power (R. 28, 45, 49), reduces deposits (R. 28) and presents competition for capital (R. 48, 50, 51), that it meets competition through individual mortgage investments (R. 57), that it meets building and loan association competition similar to that of a bank (R. 29), that it meets in various forms competition through the substantial equivalent of the conduct of the business of a bank of deposit (R. 29, 39, 53), that it meets competition for investment in government, municipal, farm loan and other bonds (R. 39, 40, 56), that it meets competition in its federal farm loans (R. 45), that it meets competition in the sale of bonds (R. 51) and from investment and bond houses (R. 47, 48), through the discounting of commercial paper by acceptance companies (R. 50), through dealers in foreign exchange (R. 50), building and loan competition both in the loaning field (R. 52, 55) and in the deposit field (R. 53, 54), that loans through loaning concerns cause losses to the banks (R. 39), and that the competing capital is large and substantial (R. 27, 29, 49), and competes generally throughout the state (R. 30).

D.

PROPER LIMITATION OF STATE TAXATION WITH REFERENCE TO STOCK IN JOINT STOCK LAND BANKS AND IN NATIONAL AGRICULTURAL CREDIT CORPORATIONS AND OF DEBENTURES AND OTHER OBLIGATIONS OF THE LATTER REQUIRE ADHERENCE TO ORIGINAL MEANING OF WORDS "OTHER MONEYED CAPITAL".

Joint stock land banks are empowered to carry on the business of "lending on farm mortgage security and issuing farm loan bonds".

Act of Cong., July 17, 1916, c. 245, Sec. 16, 39 Stat. 374.

On the subject of taxation with reference to joint stock land banks, this Act provides :

“Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located ; but such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section fifty-two hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations.”

Act of Cong., July 17, 1916, c. 245, Sec. 26, 39 Stat. 380.

By a reference in Section 16, Chapter 245 of the Act of Cong., July 17, 1916, to the powers of federal land banks, which are set out in Section 14 of the same act, the powers of joint stock land banks are very much broadened (*Act of Cong., July 17, 1916, c. 245, Sec. 16, 39 Stat. 375.*) The powers of the joint stock land bank are much broader in certain respects than the powers of national banks. The joint stock land bank was brought into existence in order to provide an agency for the making of loans which in many parts of the country were made mainly by individuals. If independently of the Joint Stock Land Bank Act, the words “other moneyed capital” in Section 5219 must be read with the addition thereto of the words “coming into competition with the business of national banks”, then to accomplish the purposes of that act the latter phrase must now be broadened so as to read “coming into competition with the business of national banks or with the business of joint stock land banks”.

Under Section 203 of the Agricultural Credits Act of 1923, providing for the formation of national agricultural credit corporations, such corporations are given power to issue collateral trust notes or debentures with a maturity not exceed-

ing three years and to pledge as security therefor any notes, drafts, bills of exchange or other securities held by them.

Section 211 of that act reads as follows :

"Taxation by a State of the shares in National Agricultural Credit Corporations, or of dividends derived therefrom, or of the income of said corporations, or real estate owned by them, shall be such only as is or may be authorized by law in the case of national banking associations; and taxation by a State of the debentures or other obligations of such corporations shall not be at a higher rate than the rate applicable to other moneyed capital in the hands of individual citizens thereof." (Italics ours.)

Act of Cong., March 4, 1923, c. 252, title II, Sec. 211, 42 Stat. 1469.

This statute treats the *shares of stock* in such a corporation and the *debentures or obligations issued* by such a corporation in exactly the same manner for the purposes of state taxation. In each case the test is the rate imposed on "other moneyed capital in the hands of individual citizens". It is clear that Congress, in prescribing a limitation with respect to taxation of *debentures and other obligations* of one of these corporations had in mind at least a comparison with *similar obligations, corporate or individual, of all kinds*. If there were doubt before, there can be no doubt since the enactment of this statute as to what Congress considered to be other moneyed capital in the hands of individual citizens. It must include at least all bonds, notes or other evidences of indebtedness or other obligations of any kind that might come into competition with the debentures and other obligations of a national agricultural credit corporation.

V.

THE STATE SUPREME COURT WAS IN ERROR IN ITS DECLARATION ON COMMON KNOWLEDGE.

We venture to say that no case will come before this court in which evidence introduced for the purpose of showing the existence of competing capital will be controverted. It may be meager, as in the *Richmond case*, or it may be overwhelming, as here, but it will not be contradicted.

Against the declaration of the majority of the State Supreme Court on that subject put forth as a matter of common knowledge, we cite (1) the act of the legislature after the amendment of Section 5219 by the Act of March 4, 1923, which assumes the existence of competing capital, (2) the act of the legislature in providing for land mortgage associations, which are clearly competing enterprises, (3) the act of the legislature in providing for so-called investment, loan and guaranty companies, which must also be competing enterprises, (4) the act of the legislature in committing to the Railroad Commission, which is the public utility commission of Wisconsin, the regulation of the issue and sale of securities constituting moneyed capital, and the regulation of brokers, corporate or individuals, clearly engaged in competing business, (5) the report of that division of the commission showing the authorization for sale within the state during the year ending June 30, 1921, of \$115,000,000 of corporate bonds, and (6) the opinion of the three dissenting members of the Supreme Court voiced by the Chief Justice.

In connection with the claim that it is a matter of common knowledge that there is no competing capital in the State of Wisconsin, we may properly take the testimony of the Wisconsin Legislature of 1923. At the time of the passage of the Act of March 4, 1923, amending Section 5219, the only moneyed capital in the State of Wisconsin subject to taxation

on the ad valorem basis consisted of shares of stock in banks and banking associations. The method of taxation was dealt with under Sections 70.31, 70.37, 70.38, 70.39 and 70.40. By Chapter 391, Laws of 1923, approved July 12, 1923, the legislature of Wisconsin attempted to make these statutes conform to the Act of March 4, 1923, by broadening the definition of the words "banks" and "banking associations" as found in the sections in question.

The method of taxation of shares of stock in banks and banking associations was prescribed by Subdivision (2) of Section 70.31. Let us analyze that subdivision by reading into it (in italics) the new definition of the words "bank" or "banking association". As so analyzed the subdivision in question reads as follows:

"All the shares of stock of

- (1) every bank or banking association whether organized under the authority of any law of this state or of any act of the congress of the United States [and]
- (2) *all corporations, associations, partnerships and individuals engaged in the banking or investment business and employing moneyed capital in competition with the business of national banks; provided, that bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing investments not made in competition with such business shall not be deemed moneyed capital * * **
- (3) shall be assessed and taxed in the assessment district in which such bank, banking association, corporation, association, partnership or individual is located for the transaction of business."

Here the legislature of Wisconsin, speaking just seven months before the court, assumes and declares that there are (1) corporations, associations, partnerships and individual citizens engaged in several features of the banking business not restricted by the laws of the state to incorporated banks, (2) others engaged in the investment business who are employing moneyed capital "in competition with the business of national banks", and (3) bonds, notes and other evidences of indebtedness in the hands of individual citizens representing investments in fact made in competition therewith, as that language is defined by this court. We respectfully submit that this court may properly look to this declaration of the legislature of Wisconsin composed of men coming from every walk of life and from every section of the state for the accepted fact of the existence in Wisconsin of a substantial amount of other moneyed capital within the meaning of Section 5219 in addition to that invested in shares of stock in national banks. This pronouncement of the legislature of the State of Wisconsin cannot be wiped aside. The State Supreme Court may not take judicial notice of a general condition contrary to that of which the legislature took notice. If the legislature, turning to the composite knowledge of its membership, declares the existence of other moneyed capital answering to the description of Section 5219, *as defined prior to the Act of March 4, 1923*, yes, and *as defined in the Act of March 4, 1923*, that should not be permitted to be wiped aside by a declaration that the Supreme Court of the State takes notice that the facts are to the contrary.

Almost immediately following the statutes pointed to by the Supreme Court of Wisconsin as restricting the business of banking to incorporated banks are found Sections 2024-100 to 2024-146, Wis. Stats. 1921, entitled "Land Mortgage Associations". These sections provide for the organization and supervision of the business of "land mortgage associa-

tions". The powers of these associations are set out as follows in Section 2024-112:

"Corporate powers. SECTION 2024-112. Said land mortgage association shall have power:

(1) To make loans, the conditions of which shall be approved by the commissioner of banking if the security taken therefor is to be used as the basis for a bond issue under subsection (3), and to accept as security for any such loan a first mortgage upon improved or partially improved agricultural lands, within this state. * * *

(3) To issue bonds secured by the pledge of the mortgage so taken or purchased.

(4) To pledge the notes and mortgages so taken or purchased under the provisions of subdivisions (1) and

(2) hereof as security for the bonds of the land mortgage association referred to in subdivision (3) hereof."

Section 2024-141 provided that when six land mortgage associations shall have been incorporated they shall form a council to be known as "Wisconsin Land Mortgage Association Council", to consist in the first instance of one stockholder from each association to be elected by the Board of Trustees thereof.

Section 2014-27, which appears in the chapter immediately preceding the chapter on banks and banking, provides for the supervision and control of "investment associations" and indicates certain conditions upon which persons, co-partnerships, associations and corporations may engage in the investment and loan business. That section reads as follows:

"Regulation. SECTION 2014-27. No person and no co-partnership, association or corporation, whether local or foreign, heretofore organized or which may hereafter be organized, *doing business as a so-called investment, loan, benefit, co-operative, home, trust or guarantee company,* for the licensing, control and management of which

there is no law now in force in this state, and which such person, co-partnership, association or corporation, *shall solicit payments to be made to himself or itself either in a lump sum, or periodically, or on the installment plan, issuing therefor so-called bonds, shares, coupons, certificates of membership or other evidences of obligation or agreement, or pretended agreement to return to the holder or owners thereof money or anything of value at some future date, shall solicit or transact any business in this state unless such person, co-partnership, association or corporation, shall have first complied with all the provisions prescribed in chapter 93 of the statutes required of foreign building and loan associations authorized to do business in this state.*" (Italics ours.)

In 1919 the legislature of Wisconsin passed an act providing for the regulation of the issue and sale of securities and placed the administration of the law in the hands of what is referred to as the Securities Division of the Railroad Commission. This law appeared on the Statutes in 1921 as Sections 1753-48 to 1753-61, both inclusive. This law provided in express terms for the engaging in competing businesses of persons, firms and corporations, and provided for a specific legal authorization of their conduct. Sections 1753-48 and 1753-52, so far as material, read as follows:

"Definitions. SECTION 1753-48. As used in sections 1753-48 to 1753-68, inclusive, the following words shall be understood in the sense herein set forth and defined:

* * * * *

(c) 'Security' or 'securities' means and includes any *bonds, stocks, notes or other obligations or evidences of indebtedness* or of title to, interest in or lien upon any or all of the property or profits of a company; and the *notes or other obligations or evidence of indebtedness* of an individual.

(d) 'Broker' means and includes every person, firm or corporation, other than an agent, who in this state engages either wholly or in part in *the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in any security or securities issued by others, or of underwriting any issue of securities, or of purchasing or otherwise acquiring such securities* for another for compensation or of purchasing or otherwise acquiring such securities with the purpose of reselling them, or of offering them for sale to the public for a commission or at a profit; (italics ours)

* * * * *

(f) 'Sale' means and includes every disposition of a security which may be made for value, and any securities given or delivered with, or as a bonus on account of any purchase of securities or any other thing shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value."

"*Certification of brokers and agents.* SECTION 1753-52. 1. No person, firm or corporation shall act as a broker until such person, firm or corporation shall have first applied for and secured from the commission a certificate authorizing such person, firm or corporation to act as a broker. * * *"

(Here follow provisions relative to the application and the passing thereon by the commission.)

To emphasize our argument on the question of judicial notice, we beg leave to cite another department of the state government. This court cannot take judicial notice of the records of the Railroad Commission of Wisconsin. But when we are confronted with a statement of the Supreme Court of Wisconsin that the findings of the trial court based upon evidence may be wiped aside as a matter of common knowledge, we feel justified in referring to the reports of the Railroad Commission of Wisconsin, not for evidence of the existence of

competing moneyed capital, but for a conclusive refutation of the declaration as to what are matters of common knowledge in Wisconsin. The annual report of the Securities Division under the law last mentioned, covering the year from July 1, 1920, to June 30, 1921, shows the authorization by that Commission of the sale of Class A bonds (to say nothing of preferred stock) in Wisconsin to the amount of \$111,162,200, and of Class B bonds to the extent of \$4,843,000. Undoubtedly, some part of these bonds may have passed into the hands of national banks. We do not claim that proof that the sale was authorized establishes that the sales were actually made; but it is a fair assumption that Wisconsin was deemed a field for the sale within a single year of over \$115,000,000 worth of bonds. If that be true for a year, what must it show as to the bonds already in the hands of the investing public?

In conclusion, we call attention to the fact that the seven men on the supreme bench of Wisconsin divided three to four as to what is a matter of common knowledge. The three declare in effect that if there were no evidence on the subject, matters of common knowledge would require them to make the same finding which was made by the trial court (See dissenting opinion, R. 90 to 95).

VI.

THE STATE SUPREME COURT PROCEEDED UPON A MISUNDERSTANDING OF THE DECISIONS OF THIS COURT.

A.

THE MAJORITY OPINION SQUARELY CONFLICTS WITH THE DECISION OF THIS COURT IN THE RICHMOND CASE IN HOLDING THAT ASIDE FROM STOCK IN INCORPORATED BANKS MONEYED CAPITAL INCLUDES ONLY CAPITAL USED IN PRIVATE BANKING.

The majority opinion proceeds on the assumption that prior to the enactment of the income tax law the business of banking in Wisconsin had by statute been "strictly confined to national banks and corporations organized under the banking laws of the state" (R. 75), and that as shares of stock in these corporations are classed with shares of stock in national banks there is no violation of Section 5219. That is another way of saying that aside from shares of stock in incorporated banks there can be no moneyed capital within the meaning of the statute except that employed in private banking. As appears from the discussion of the *Richmond case* (*Merchants' National Bank vs. Richmond*, 256 U. S. 635), quoted at p. 39 supra, the State Supreme Court assumed that this court had before them in the record some proof that the bonds, notes and other evidences of indebtedness therein referred to were in the hands of private bankers. In anticipation of any argument that might be so made we had procured and placed at the disposal of the court a transcript of the record before this court in the *Richmond case*. A comparison of the evidence in the two cases shows that we went far beyond the showing made in the *Richmond case*. So striking was this that we felt constrained to make plain that we had not the transcript at the time of the trial. There was no evidence in the *Richmond case* to the effect that the bonds, notes and other evidences of indebtedness upon the discrimination

in favor of which the case turned were either wholly or partly in the hands of private bankers or used in the banking business. Neither was the evidence on competition so limited. In these respects there is no difference whatever between the two records. Indeed, the record in the case at bar is far stronger on competition. The two cases cannot be so distinguished.

If the evidence in the record in the *Richmond case* were looked upon as leaving in doubt the question whether the \$6,250,000 of bonds, notes and other evidences of debt on the discrimination in favor of which the case turned were wholly or partly in the hands of private bankers, the question would still be put at rest by reference to the laws of Virginia, from which it appears that private bankers paid a license tax and were not subject to an ad valorem tax upon their capital.

In the Virginia case of *Commonwealth vs. Hutzler*, 124 Va. 138, decided on January 16, 1919, two months before the first decision in that court in *Richmond vs. Merchants National Bank of Richmond*, 124 Va. 522, arising on writ of error to the Hustings Court of Richmond, it appeared that Hutzler, doing business as a private banker, was assessed with and paid for the year 1915 a *state license tax* measured by the capital employed in his banking business pursuant to the provisions of Sections 77 and 78 of the statutes of that state, commonly known as the Tax Bill.

For the same year he was assessed with an *ad valorem state tax* on such capital. The Hustings Court on his application, being of the opinion that the assessment was erroneous, entered a judgment exonerating him from the payment of the ad valorem tax and a writ of error was sued out to review that judgment. The court said, among other things:

“* * *, we are constrained to conclude that *the very substantial license tax imposed on private bankers by Section 78 of the Tax Bill, specifically and exclusively measured ‘on the capital,’ must be regarded not merely as a privilege tax, but as a charge upon the capital itself.*

If this be true, *the additional assessment under Section 8 of Schedule C, being upon 'capital otherwise taxed,' was plainly unlawful, and the defendant in error was properly exonerated from its payment.*" (Italics ours.)

The discrimination complained of in the *Richmond case* was the taxation of bonds, notes and other evidences of indebtedness on the ad valorem system and at a lower rate. If they were so taxed they could not have been in the hands of private bankers.

The conclusion that private banking has been eliminated in Wisconsin is based in the main on Sections 2024-78l and 2024-78m, Wis. Stats. 1921. These statutes are aimed against the carrying on of the business of a bank of deposit and were sustained on that theory. They read:

"Banking, defined. SECTION 2024-78l. The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing, provided that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal.

"Banking, unlawful, without charter; penalty. SECTION 2024-78m. It shall be unlawful for any person, copartnership, association, or corporation to do a banking business without having been regularly organized and chartered as a national bank, a state bank, a mutual savings bank, or a trust company bank. Any person or persons violating any of the provisions of this section, either individually or as an interested party in any copartnership, association, or corporation shall be guilty of a misdemeanor and on conviction thereof shall be fined in a sum not less than three hundred dollars nor

more than one thousand dollars, or by imprisonment in the county jail not less than sixty days nor more than one year, or by both such fine and imprisonment."

"State banks; time limited for reincorporation. SECTION 2024-78n. Any person, copartnership, association or corporation doing business in this state as defined in sections 2024-78l, 2024-78m and 2024-78n, may incorporate as a state bank and may convert into a state bank, on or before September 1, 1909, as provided in section 2024-55 of the statutes."

Within a year after the enactment of this statute, two cases were presented to the Supreme Court of Wisconsin testing its validity,—*MacLaren vs. State*, 141 Wis. 577, *supra*, and *Weed vs. Bergh*, 141 Wis. 569. The legislative restriction was upheld, the statute being construed as applying only to the conduct of the business of a bank of deposit. In *MacLaren vs. State*, 141 Wis. 577, the court quoted from *Oulton vs. Savings Inst.*, 17 Wall. 109, 118, to the effect that banks in the commercial sense are of three kinds—(1) of deposit; (2) of discount, and (3) of circulation. It was pointed out that the term "banking" might include all of these activities, but that it might also be used in a more narrow and restricted sense. [141 Wis. 581] "There is no doubt as to the sense in which the legislature intended to use the term here, because it says that the receiving of deposits as a regular business shall constitute banking." And again, [141 Wis. 582] "*The main purpose of regulating the banking business as the business is now carried on is to insure the safety of deposits.*" In sustaining the act in question in *Weed vs. Bergh*, 141 Wis. 569, the Supreme Court specially referred to *MacLaren vs. State*, 141 Wis. 577, for its discussion of the scope of the act under consideration.

It is stated in the majority opinion (R. 87) that dealers in bonds, mortgages and securities are not in Wisconsin permitted to use the word "bank", "savings bank", or "banker",

or the plural thereof upon any office sign or on any letterhead or other written or printed matter (Section 2024-50, Wis. Stats. 1921). Grant that they may not call themselves "bankers", it does not follow from that that they or any other individuals or corporations are forbidden to engage in the business ordinarily carried on by banks of discount. In determining whether for the purposes of the test of competition, which has been read into Section 5219, an individual is deemed to be employing his investments in banking business, we are to look to what he does and not to the sign on his office door or to his letterhead. The same is true of a corporation which is engaged in the same kind of business. The statute pointed to as eliminating private banking is aimed at *banks of deposit* and not at banks of discount. There is nothing to prevent an individual from carrying on all the business commonly carried on by a bank of discount and in doing so from employing any amount of moneyed capital in that business. The moment he employs any moneyed capital in that business, that moneyed capital is brought into competition with the business of national banks.

In *First National Bank vs. Anderson*, ... U. S. ..., 46 Sup. Ct. 135, at 138, this court used the following language, which might well be used in the case at bar:

"The defendants took the position that the congressional restriction was directed only against discrimination in favor of state banking associations, and they persisted in it to the extent of making no effort at the trial to controvert the evidence produced by the plaintiff to show that a relatively large amount of moneyed capital, taxed at a lower rate than the bank's shares, was employed in substantial competition with the business of the bank."

B.

THE DISCUSSION IN THE MAJORITY OPINION CONFLICTS GENERALLY WITH THE DECISIONS OF THIS COURT.

Most of what might properly be dealt with separately under this heading has been discussed at various points in the course of this brief. What we can best do here is to summarize the misconceptions of the law which appear in the course of the majority opinion. We beg leave to point out that the trial court persisted in the view that the discrimination aimed at was that in favor of state bank shares and quoted a statement from the Congressional Record made in 1868 tending to support that view (R. 84, bottom), notwithstanding that it has repeatedly been held otherwise; followed a narrow and technical definition of competition (R. 84, bottom); unjustifiably restricted their view of the evidence supporting the finding of the trial court (R. 85); wholly disregarded the evidence as to the manner in which building and loan associations are now in fact operated (R. 86); failed to appreciate in dealing with brokers and dealers in bonds, mortgages, securities and acceptance companies (R. 86, 87) that the rule does not require that the business be done in the same manner in which it is done by national banks, and that the competition may be the more effective where the competing individual or concern has greater latitude in his or its dealings; proceeded on the erroneous theory that investments of individuals in order to be competing must be "made as a business" (R. 88); sought the test of competition in *unfriendly discrimination* or a *hostile attitude* on the part of the state; and concluded against a finding of discrimination because (as, without evidence, they declared the fact) national banks are prosperous (R. 89) and (also without evidence) there is no moneyed capital "*bidding for business which national banks are authorized to do*" (R. 90).

The State Supreme Court erroneously followed the holding of the Supreme Court of Appeals of Virginia in the *Richmond case*, which this court reversed, stating:

[256 U. S. at p. 638] "*The Supreme Court of Appeals entertained the view that the purpose of § 5219, Rev. Stats., was confined to the prevention of discrimination by the States in favor of state banking associations, as against national banking associations, and that since none such is shown here there was no repugnance to the federal statute. This, however, is too narrow a view of § 5219 (citing Boyer vs. Boyer, 113 U. S. 689, 691-692, and quoting the statutory restriction.)*". (Italics ours.)

Erroneously, the Supreme Court of Wisconsin has drawn from the opinions of this court in the bank stock tax cases cited and discussed, the view that moneyed capital, to come within Section 5219, must be employed in a business (R. 89) directly competitive for business with national banks. This is only part of the rule established by this court and refers merely to when shares of stock in corporations in the hands of individuals, or capital interests owned by individuals in unincorporated concerns, constitute moneyed capital.

The other part of the rule laid down in the *Richmond case*, and the prior decisions therein cited, was lost sight of. It clearly includes the investments of individual citizens, regardless of the nature of their business, in securities for the payment of money at interest, which investments come into competition, under the law of supply and demand, with the business of national banks in the loan and investment markets, and, for that matter, for capital itself.

The dissenting justices recognized this distinction in the applicable tests. In the able dissenting opinion, the error of the majority opinion was pointed out by quoting the true rule from the *Richmond case*, since reaffirmed in the decision in *First National Bank vs. Anderson*, ... U. S. ..., 46 Sup. Ct. 135. A brief extract from the dissenting opinion will

suffice, which, except for the first three words, is taken from the *Richmond* opinion :

[R. 94] "this 'moneyed capital' 'included money in the hands of individuals employed in a similar way *invested* in loans or in securities for the payment of money either as an *investment* of a permanent character or temporarily with a view to sale or repayment and reinvestment.' " (Italics ours.)

To take a narrow view of the business of a national bank and then to consider only that moneyed capital which is used in the same identical manner is to defeat the purpose of the law. There is a greater need for protection against competition where the competitor is not restricted as is the bank itself.

CONCLUSION.

To give to the words "moneyed capital" in Section 5219 the interpretation adopted in the State Supreme Court is to emasculate the statute. It means going back to 1868 and reversing the action of Congress and preserving the test of comparison with state banks and rejecting the test of comparison with other moneyed capital. It means the rejection of the primary meaning of other moneyed capital as money at interest. It means the removal of safeguards erected against discrimination not merely against national banks and in favor of state banks but against national banks and state banks and in favor of other forms of financial investments. Ours is a federal government in which the powers necessary and essential to national life have been given to the central government. Its founders realized that the national government must have the power to provide for a national currency and this is apparent from the constitution. With prophetic vision the builders in this court in an early day recognized that agencies of the national government must be free from control or interference by the state governments. The part that banking

institutions would ultimately play in the life, the welfare and the preservation of the government was properly not foreseen, but it was held that if the United States created a banking institution to operate as an agency of the national government there could not with safety be recognized in the states any power to tax that agency. It was, of course, reasonable for the national legislature to permit states to tax national banks or shares of stock therein within limitations by it prescribed, which limitations could be changed from time to time as the wisdom of modifications might be demonstrated by experience. So it was that Congress permitted the states at first to tax national bank stock provided they imposed no greater burden thereon than they imposed on state bank stock. In 1868, deeming that sufficient protection was not given if the states were limited in the tax burden only by that which they might impose on other bank stock, Congress amended the law and limited the states to an imposition of a tax burden not exceeding that imposed on other moneyed capital. It was not the purpose of Congress to prescribe the method of taxation which the states might adopt, but it was the purpose of Congress to exact a test which could only be applied under an ad valorem system of taxation or under a system in which the tax imposed could readily be reduced for the purposes of comparison to the terms of an ad valorem tax. In 1911 Wisconsin abandoned ad valorem taxation and went over to income taxation so far as intangibles are concerned. Indeed, the purpose then was to abandon ad valorem taxation entirely as to personal property. After that time it became the purpose of the state to exempt all moneyed capital in general and to impose an ad valorem tax only in special cases. Exemption was no longer the exceptional thing. Taxation became the exceptional thing. The state affords no basis for the application of the old test. Congress seeing the necessity for adapting the permissive power to tax to new conditions has since made it possible for states to tax the shares of stock on the ad valorem basis,

or the income of the bank or the dividends received by the stockholder as part of his income, prescribing a separate test in respect to each. While the case at bar arose before the amendment of March 4, 1923, and therefore does not require a determination in respect thereto, we think it proper to say that according to our view Congress intends now to require that while the states may choose any one of these three methods of taxation, they must choose that method which permits under their respective laws of the application of the test appropriate thereto. Where a state abandons ad valorem taxation as to moneyed capital in general and adopts income taxation, the application of the ad valorem test is idle. A free choice is given to the state legislature, and that character of law should be adopted in which the purpose to comply with the limitations prescribed by the Act of Congress will be apparent on the face of the law itself.

Respectfully submitted,

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FAIRCHILD AND J. GILBERT HARDGROVE,

Counsel for Plaintiff in Error.

E. W. SAWYER,

Of Counsel.

APPENDIX A.

Section 5219, United States Revised Statutes, prior to amendment of March 4, 1923.

"Sec. 5219. (State taxation.) Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other money capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed. (R. S.)"

APPENDIX B.

Act of March 4, 1923.

"An act to amend Section 5219 of the Revised Statutes of the United States.

That Section 5219 of the Revised Statutes of the United States be, and the same is hereby amended so as to read as follows:

Sec. 5219. The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all of the shares of na-

tional banking associations located within its limits. The several States may tax said shares, or include dividends derived therefrom in the taxable income of an owner or holder thereof, or tax the income of such associations, provided the following conditions are complied with:

1. (a) The imposition by said State of any one of the above three forms of taxation shall be in lieu of the others.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations, nor higher than the highest of the rates assessed by the taxing state upon the net income of mercantile, manufacturing, and business corporations doing business within its limits.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares or the net income as above provided of any national banking association owned by non-residents of any State, or the dividends on such shares owned by such non-residents, shall be taxed in the taxing district where the association is located and not elsewhere; and such associations shall make return of such income

and pay the tax thereon as agent of such non-resident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of Section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section." (42 Stat. L. 1499.)

APPENDIX C.

Wisconsin Statutes of 1921 relating to assessment and taxation of bank stock.

70.31. **Bank stock, assessment.** (1) The president, cashier or other officer in charge of any bank, shall make out and deliver to the assessor annually on or before the first day of June a verified statement showing the number and par value of the shares of stock, the names and residence of each stockholder therein on the preceding first day of May and the amount of stock owned or held by him on that day.

(2) All the shares of stock of every bank or banking association, whether organized under the authority of any law of this state or of any act of the congress of the United States shall be assessed and taxed in the assessment district in which such bank is located for the transaction of business.

(3) The shares of stock in any bank shall be liable to assessment and taxation as personal property and shall be entered upon the assessment roll in the names of the several owners, separately from the assessment of

other personal property assessable to such owners. The valuation of such shares of stock and the taxes thereon shall be separately entered in the tax roll.

70.37. Assessment, how made; deductions. In the assessment of shares of stock in any bank the assessor shall first determine the total true cash value of all such shares according to his best judgment. If the building in which such bank maintains its offices and transacts its business be owned by such bank, the assessed value thereof, including the land upon which it is located, if owned by such bank, not exceeding the amount for which such building and land are carried as an asset upon the books of the bank, shall be deducted from the total value of such shares. The remainder of such total value or the whole thereof, if the bank does not own such building, divided by the total number of such shares, shall be taken as the valuation for assessment of each of such shares. No deduction shall be made on account of any other real estate in the assessment of the shares of stock of any bank.

70.38. Tax a lien on shares of stock; levy and sale.

(1) The taxes levied upon the shares of stock in any bank shall be a lien upon such shares from the time of the assessment on the preceding first day of May, which lien shall be prior to all other claims or liens. Such taxes and the lien therefor may be enforced by any officer having authority to collect such taxes by levy upon and sale of such shares of stock under his warrant for the collection thereof.

(2) Such levy may be made by delivering to the president or cashier of such bank, or to any other person who has at the time the custody of the books and papers thereof, a notice referring to such warrant and stating that by virtue thereof he thereby levies upon such shares of stock, designating the number of such shares, the name of the person to whom assessed and the amount of taxes

thereon, for the purpose of making sale thereof to satisfy such taxes in the manner provided by law.

(3) In making sale of such shares under such warrant it shall not be necessary for such officer to exhibit or have in his possession the certificates or other evidences of such shares. Upon making such sale the officer shall issue duplicate certificates of sale in the manner specified in Section 2990 of the statutes and the purchaser at such sale shall be entitled to all the rights and remedies given in said Section 2990 to purchasers of shares of corporate stock upon sale under execution.

70.39. Bank may pay tax on stock. Any bank is authorized to pay such taxes on the shares of stock in such bank and shall have a lien from the preceding first day of May upon the shares of stock for the amount of the taxes so paid with interest and for any costs or expenses incurred therewith or any such bank may at its option pay such taxes for all the stockholders in such bank out of its earnings or other available resources as the expenses of such bank.

70.40. Exemption. The taxation of the shares of stock in banks as provided in Sections 70.31, 70.37, 70.38 and 70.39, shall be in lieu of all taxes upon the capital, surplus, property and assets of such banks, except that no real estate owned by any bank or banking association or constituting the whole or any part of its capital, surplus or assets shall be exempt from taxation.

APPENDIX D.

Wisconsin law of 1923 designed to conform Wisconsin statutes to Act of Congress of March 4, 1923.

CHAPTER 391, LAWS OF 1923.

AN ACT to amend Section 70.37 and to create Sections 70.404 and 70.405 of the statutes, relating to the taxa-

tion of banks or banking associations and corporations, partnerships, and individuals employing moneyed capital in competition with national banks.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. Section 70.37 of the statutes is amended to read: 70.37. In the assessment of shares of stock in any bank the assessor shall first determine the total true cash value of all such shares according to his best judgment. If * * * such bank * * * *owns any real estate which is separately assessed, the assessed valuation thereof, not exceeding the amount for which the same is included in determining the total true cash value of such bank shares,* shall be deducted from the total value of such shares. The remainder of such total value or the whole thereof, if the bank does not own * * * *real estate,* divided by the total number of such shares, shall be taken as the valuation for assessment of each such shares * * *.

Section 2. Two new sections are added to the statutes to read: 70.404. For the purposes of Sections 70.31, 70.37, 70.38, 70.39, 70.40 and 70.405, the term "bank" or "banking association" shall include all corporations, associations, partnerships, and individuals engaged in the banking or investment business and employing moneyed capital in competition with the business of national banks; provided, that bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section, and any tax paid under the provisions of said Sections 70.31, 70.37, 70.38, 70.39 and 70.40 shall be in lieu of any income tax upon income derived from such business.

70.405. If it shall be finally adjudicated or determined that the provisions of Sections 70.31, 70.37, 70.38, 70.39, 70.40 and 70.404 are invalid in application to national banks, each bank or banking association and all corporations, associations, partnerships and individuals included under the term "bank," or "banking association," by Section 70.404, shall be assessed and taxed respectively from and after the taking effect of this section in lieu of the tax under said sections in the same manner as other corporations, associations, partnerships and individuals under the provisions of the income tax law in force during the period after the taking effect of this section. This section shall apply to the 1923 and subsequent assessments.

Section 3. This act shall take effect upon passage and publication.

Approved July 12, 1923.

APPENDIX E.

Wisconsin statutes of 1921 exempting other moneyed capital.

"70.11. **Property exempt from taxation.** The property in this section described is exempt from taxation, to-wit:

* * * * *

(10) All moneys or debts due or to become due to any person and all stocks and bonds, including bonds issued by any county, town, city, village, school district, or other political subdivision of this state, not otherwise specially provided for.

* * * * *

APPENDIX F.

We here print a tabulation from the 1924 annual report of the Comptroller of the Currency showing approximately one-third of the investments of national banks indicated by *italics* (ours) consisting of bonds and notes issued by railroad, public service and miscellaneous corporations: (p. 44)

“(In Thousands of Dollars)”

Domestic Securities

	<i>June 30</i> 1923	<i>June 30</i> 1924
State, county or other municipal bonds.	401,816	505,528
<i>Railroad bonds</i>	503,348	573,571
<i>Other public service corporation bonds.</i>	337,293	397,560
<i>All other bonds</i>	521,200	575,743
Claims, warrants, judgments, etc.....	90,252	90,594
<i>Collateral trust and other corp. notes..</i>	135,235	105,933
Foreign government bonds.....	153,723	179,470
Other foreign bonds and securities....	91,236	85,055
Stock, Federal reserve banks.....	71,862	72,318
Stocks, all other.....	69,892	74,778
	<hr/>	<hr/>
Total	2,375,857	2,660,550
	<hr/>	<hr/>
United States Government Securities	2,693,846	2,481,778
Total Bonds of all classes.....	5,069,703	5,142,328”

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Reply Brief For Plaintiff In Error

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 186

**FIRST NATIONAL BANK OF HARTFORD,
WISCONSIN,**

Plaintiff in Error,

vs.

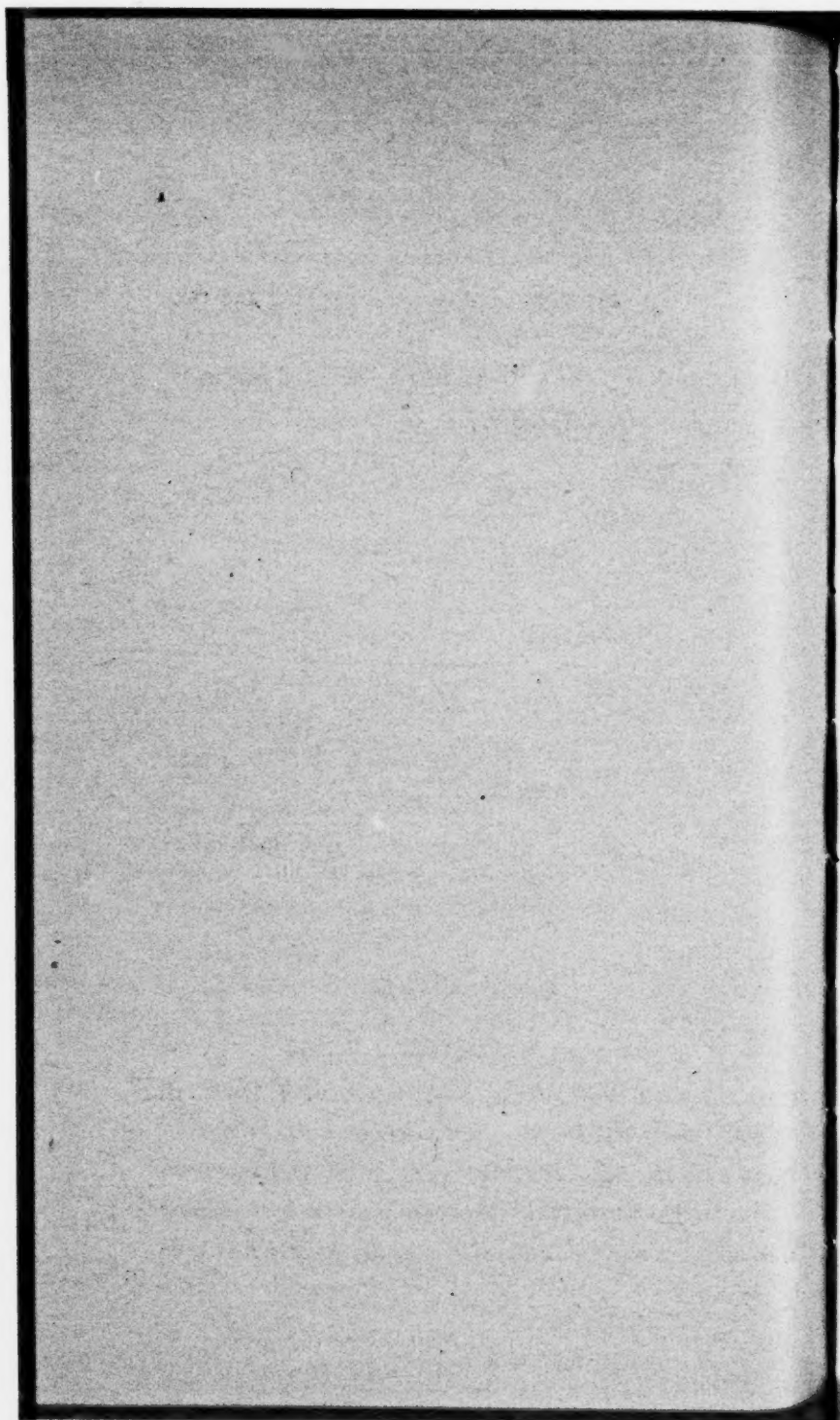
**CITY OF HARTFORD AND STATE OF WISCONSIN,
*Defendants in Error.***

**IN ERROR TO THE SUPREME COURT OF THE
STATE OF WISCONSIN.**

**GEO. P. MILLER, EDWIN S. MACK,
ARTHUR W. FAIRCHILD, J. GILBERT
HARDGROVE,**

Counsel for Plaintiff in Error.

**E. W. SAWYER,
*Of Counsel.***



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SUPREME COURT OF THE UNITED STATES

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No. 186

FIRST NATIONAL BANK OF HARTFORD,
WISCONSIN,

Plaintiff in Error,

vs.

CITY OF HARTFORD AND STATE OF WISCONSIN,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF WISCONSIN.

REPLY BRIEF OF PLAINTIFF IN ERROR.

While at first glance the brief of the defendants in error may seem plausible, it does not bear careful analysis. In order to demonstrate this, we feel constrained to submit this brief in reply. We will avoid so far as we may going into detail.

I.

STATEMENT OF FACTS PROPOSED BY DEFENDANTS IN ERROR
NOT ACCEPTABLE.

Counsel for the defendants in error, addressing themselves to the statement that the undisputed evidence shows the existence of competitive moneyed capital, say that counsel for the plaintiff in error draw "such erroneous conclusion [conclusions?] from the undisputed evidence, that we feel compelled to make our own statement of facts." They

then proceed to what they term a topical grouping of facts. *They do not challenge any statement of fact which we made.* They simply attempt to rearrange and restate under separate headings. In so doing, they omit at some points and by taking parts of the evidence out of their proper setting, leave erroneous impressions at other points. Their statement of facts may not properly be adopted in the decision, whatever that decision may be.

1. *Bank Facts.* (Brief of Defendant in Error, pp. 2, 3.) The discussion of the evidence as to the Bank's dealings in mortgages is incomplete. Not only does the Bank buy and sell and loan on mortgages (R. 26); and negotiate mortgages which are turned over to clients (R. 45); but it deals in bonds of organizations like the Wisconsin Farm Loan Association (R. 26); is interested in federal farm loans and has made such a loan (R. 45); was in the business of selling Wisconsin farm mortgage loan bonds, of which it sold in the neighborhood of \$30,000 or \$40,000 in 1921, these bonds having been bought for its own investment in the first instance and some having been sold, although that was not the prime purpose of their purchase (R. 56); and its real estate loans, as shown by its reports offered in evidence by the city, ran to \$33,325 in February, April and June, 1921 (for detail see our main brief, pp. 18 and 19).

No true picture of the Bank's mortgage loan business may be had if we disregard the dealing in bonds of such organizations. These are financial corporations. Their business is such that their stock constitutes moneyed capital. Their bonds going out into the hands of the public are nothing more nor less than real estate mortgage indebtedness such as was held to be in competition in *First National Bank of Guthrie Center vs. Anderson*, 269 U. S. 341; 46 Sup. Ct. 135. In this connection, we direct attention to the powers of land mortgage associations discussed at pp. 48, 62 and 63 of our main brief. These associations carry on operations similar in character to the receiving of deposits, present competition in that field also.

2. "*Lenders*" in *Real Estate Mortgages* and "*Dealers*" in *Mortgages* (Defendant in Error's Brief, pp. 3 and 4). This is the characterization accorded by counsel to certain of the individuals and firms concerning whom evidence was offered.

The inference is drawn that Russell was not lending his own money but merely acted as a lending agency or bought and sold western mortgages (Defendant in Error's Brief, p. 3). Liver testified that Russell was one of a number of individuals engaged in selling notes and mortgages and securities and had been in that line of work eight or ten years (R. 26, 27). Russell said he had been in the loan business ten years. While he said that the individuals for whom he loaned money resided in and about Hartford, he did not as counsel state (Defendant in Error's Brief, p. 3) say that he only loaned for them. On the contrary, he testified that he had loaned out money from time to time to such individuals on interest bearing securities, that is, *bonds and mortgages*, the lands covered by the mortgages being in North Dakota (R. p. 65). His testimony relative to *bonds* was *not limited* to mortgage bonds. The inferences and comments are therefore unwarranted.

It is argued (Defendant in Error's Brief, p. 3) that Sayles was merely a dealer or merchandizer in mortgages. Liver testified that Sayles was engaged in the *loan business* (R. 27). True, in direct examination, Sayles said he had been engaged for ten years in the business of *selling* mortgages (R. 57) but, on cross-examination, he said that he started in business in 1906 and was in the *loaning business* up to 1921 (R. 58). He is quoted as saying that he had sold \$500,000 worth of mortgages in ten years (Defendant in Error's Brief, p. 3). He testified that he had sold about \$500,000 of *outstanding mortgages* (R. 57) and had practically that amount *outstanding in 1921* (R. 58).

Liver is quoted (Defendant in Error's Brief, p. 4) as saying that there were individuals in Hartford "*selling notes*

and mortgages." He in fact testified to individuals "engaged in selling notes and mortgages and securities" (R. 26). He is quoted as saying that these consist of Russell and Sayles (Defendant in Error's Brief, p. 4). He, in fact, gave these names in response to a request to name *some* of the individuals and concerns so engaged and then went on to give the names of Thoma and the Hartford Building and Loan Association as engaged in loaning out money and of Sauerhering & Gehl as making loans in real estate (R. 26). It was brought out on his cross-examination that Sauerhering & Gehl were in the loaning business and that their making loans caused losses to the bank (R. 39). Counsel argued as to what "he evidently means" and as to what "it is inferable" that these individuals and concerns do and how their business is conducted (Defendant in Error's Brief, p. 4). This is not a case in which there was *conflicting* evidence and in which inferences may be indulged in to support a finding based on one of two lines of such conflicting evidence. The evidence is undisputed. It supports the finding made by the *trial court*. That finding may not be wiped aside by inference. Inference may not be indulged *against* a line of undisputed evidence. Inference may *solve*; but may not *create* conflicts.

Liver is quoted (Defendant in Error's Brief, p. 4) as estimating that the loans made by these various parties would run from \$250,000 to \$300,000. He, in fact, testified that it would be about that *annually* and that this was true in 1921 (R. 27) and counsel had him confirm it on cross-examination (R. 39).

Discussing Liver's testimony with reference to the Ziegler Company, counsel *indulge the inference* that it does business in the same manner as other local real estate and mortgage dealers and agents (Defendant in Error's Brief, p. 5). There is nothing in his testimony indicating that the *loan* business of this company was limited to real estate loans. Nor would that warrant the *inferences* asked to be indulged as to their

manner of doing business. *The opportunity for cross-examination and counter evidence was open; but was not availed of.*

Mr. Liver is quoted as saying that many of the local mortgage dealers and agents deposit the moneys they handle with the Bank (Defendant in Error's Brief, p. 39). He, in fact, testified that Sauerhering & Gehl, Russell and Thoma had savings accounts and Sayles and the Building & Loan Association deposited money in the Bank and, also, that the first three received money from their clients and either put it in the Bank or loaned it to someone else and that there were also lots of those concerns, like the Building and Loan Association, that took deposits and held them as deposits. These matters were brought out on cross-examination (R. 39).

Leins, the Register of Deeds, is quoted as testifying that in 1921 there were mortgages running to individuals in the amount of \$1,507,810.54 (Defendant in Error's Brief, p. 5). He testified, not with reference to the amount of mortgages there were, but with reference to the amount that were *recorded in the county in the year*. By way of comment, it is stated that there was no statement as to what percentage ran to individuals and what to corporations (Defendant in Error's Brief, p. 5). The compilation related *only* to mortgages running to individuals.

3. *Dealers in bonds, notes and stocks.* Liver is quoted as testifying that there were Chicago and Milwaukee concerns buying and selling securities, mortgages, notes and bonds and that these were real estate, public utility and municipal bonds (Defendant in Error's Brief, p. 6). In this quotation, there is omitted from his testimony that there were various individuals and concerns in Hartford engaged in selling notes, mortgages *and securities* in 1921 and prior thereto (R. 26 and 27). In testifying as to the bonds sold by outside concerns, he did not limit himself to real estate, public utility and municipal bonds. He said that the securities they offered *included* bonds, notes, mortgages and stocks;

among the bonds, real estate and utility bonds; *in fact*, all *kinds of bonds*—bonds on buildings, bonds on farms and municipal bonds (R. 28).

The testimony of Grove is attempted to be restated (Defendant in Error's Brief, pp. 6 and 7). It is given fully and accurately in our main brief at pages 12 to 15. He is quoted as referring to the business of the First Wisconsin Company as "*so-called bond dealers*" (Defendant in Error's Brief, p. 6). His testimony was that it was engaged in the *so-called bond business* (R. 46). He did not limit the business of his Company to the sale of bonds and securities. He testified as to the extent of the business of his Company in the sale of bonds and securities. (Compare Defendant in Error's Brief, p. 6 with R. 46.) Twice the First Wisconsin National Bank is referred to as the largest bank in Wisconsin (Defendant in Error's Brief, pp. 6 and 7). In point of fact, it is the largest bank in Wisconsin. There is, however, no evidence in the record on that subject. If we were to indulge in the same method of argument, we venture to say that there would be very little left for discussion in this case.

The comment is indulged that the creation of the First Wisconsin Company suggests a doubt as to the power of national banks to engage in the merchandizing of bonds and securities. It suggests rather that the growth of investment and bond houses has been so great and the competition so effective by reason of the restrictions on banks that banks are finding it necessary in Wisconsin to organize affiliated companies, who, by reason of their greater freedom of action, can the better compete with other financial corporations and firms and individuals engaged in that line of business. The First Wisconsin Company's capital stock is \$600,000 preferred, and 10,000 shares of no par value common. Counsel state that the record is silent as to whether this stock is held directly by the Bank or in trust for its stockholders. Grove testified that the preferred stock was held largely by stockholders of the First Wisconsin National Bank and all of the

common stock, excepting directors' qualifying shares, is held for the benefit of the present and future stockholders of the First Wisconsin National Bank (R. 47, 48). The First Wisconsin Company pays an income tax (R. 48), which means, not only that its stock is exempt from ad valorem taxation, but that the dividends thereon are not subject to income tax.

4. *Building and Loan Associations.* The testimony on this subject is fully abstracted in our main brief in the fourth paragraph on page 8, the last paragraph on page 9 and in the testimony of Schauer on pages 15 and 16.

Counsel have not attempted to challenge any statement of fact in these portions of our brief and, in the absence of such challenge, we assume that the restatement will be disregarded.

5. *Acceptance Companies.* The testimony on this subject is that of Mr. Grove. It is found entirely on page 50 of the record.

Counsel do not quote the direct statement that the business of these companies is lending money and discounting commercial paper. Neither do they quote the statement that these companies compete directly with national banks. The statement of the witness that they handle large sums was in answer to the question as to whether they had taken over a large part of the business of national banks.

6. *Foreign Exchange.* (Defendant in Error's Brief, p. 8. Except for the argument, nothing is added to the statement on the same subject in our main brief, page 14.

7. *Personal Investment in Bonds, Securities and Other Investments.* (Defendant in Error's Brief, p. 8). Under this heading, counsel apparently gives no consideration whatever to investments in mortgages, disregarding Liver's statement that certain concerns had loaned out \$250,000 to \$300,000 annually (R. 27); that bond houses sold bonds and securities in the banking district tributary to Hartford in substantially large quantities (R. 22); that the Ziegler Company, not only made loans, but circularized loans (R. 30);

the testimony of Leins as to the recording in a single year of over \$1,500,000 in mortgages (R. 57); the testimony of Sayles that he had outstanding in the vicinity of Hartford \$500,000 of mortgages sold by him (R. 57); and the testimony of Russell that he had been loaning money for individuals in and about Hartford for ten years (R. 65).

There should also be considered Grove's testimony that his Company had sold in a single year, largely to individuals, more than \$25,000,000 worth of bonds and other securities, more than 90 per cent of which were sold in Wisconsin (R. 47); that a large number of individuals in Milwaukee sold their bonds quite largely—extensively throughout the state (R. 47); that there were individuals in Milwaukee engaged in making personal loans, the aggregate of whose loans was a very substantial amount (R. 49).

8. *Loans on Short Term Papers, Similar to Bank Loans.* (Defendant in Error's Brief, p. 8).

9. *Private Banks.* (Defendant in Error's Brief, p. 9).

The discussion under these headings consists wholly of argument.

10. *How "Moneyed Capital" Competes With Banks.* (Defendant in Error's Brief, p. 9). Under this heading, counsel undertake to analyze the testimony of Liver and Grove. For Liver's testimony, they cite R. p. 28. No proper picture of Liver's testimony on this subject can be gathered without considering also his statement that the loaning concerns located in Hartford compete with the business of the bank the same as any other banks would be in competition (R. 27); that the withdrawals affected its loaning department (these withdrawals might be either by firms or individuals engaged in the loaning business or by individuals purchasing bonds or loans and the limitation assumed in counsel's brief (P. 9) is unwarranted.) The direct effect upon the banking business of the sale of bonds in the community is that people draw out their money and buy bonds, thus reducing deposits (R. 28, 29). The Building and Loan As-

sociation competes the same as banks do (R. 29). The conditions as to competition are the same all over the state (R. 30).

Nor is there an adequate presentation of the testimony of Grove. By way of illustration, his ^{company} ~~bank~~ has a direct relation to the First Wisconsin National Bank, taking care of the investment business (R. 48). It conducts some of the business that would ordinarily be conducted by the bank (R. 48). It was organized to take over two of the functions of the bank and was, in fact, in competition with the bank in the selling of bonds (R. 51). Bonding companies come into competition both for capital and for deposits (R. 48). The banks would meet competition from bonding companies and individuals engaged in selling bonds, both in the matter of buying and selling securities and in the lending of money (R. 49). He says that investment houses dealing in all kinds of securities would come into competition with loans "especially in short time loans" (R. 49).

We have thus reviewed the statement of facts which counsel for defendants in error would have the Court substitute for that set out in our main brief, with two thoughts in mind, first, that the correctness of our statement is nowhere challenged, and, second, that the statement sought to be substituted therefor is incomplete and inaccurate. We suggest no purpose to mislead. The inaccuracies have been the result of a somewhat arbitrary attempt to rearrange and classify, in connection with which the true color of the evidence has at various points been lost, due to the fact that many statements have been taken out of their original setting and read in an incorrect light.

II.

COUNSEL'S STATEMENT OF WISCONSIN'S BANKING AND TAXATION LAWS ANSWERED.

At pages 12 to 15 of their brief, counsel for defendants in error discuss the statutes claimed to prohibit all private

banking in Wisconsin. They say that by Chapter 285, Laws of 1909, the Wisconsin banking law was amended by the adoption of *two* new sections, now known as Sections 224.02 and 224.03 of the Wisconsin Statutes of 1923 and 1925. Accuracy requires reference to the sections as they appear in the Wisconsin Statutes of 1921. These two sections there appear as Sections 2024-78l, and 2024-78m, quoted in our main brief at page 69. Chapter 285 of the Laws of 1909 did not merely create two new sections. That chapter is entitled "An Act to create Sections 2024-78l, 2024-78m and 2024-78n of the statutes relating to banking." Since 1907 the Legislature of Wisconsin has followed the practice of making of every act, at the moment of its passage, a revision of the existing statutes so that at the close of every session we have in effect a new set of revised statutes. While by Chapter 285 of the Laws of 1909 *three* new sections were thus created, that chapter standing as a whole introduced *one new subject matter* into the statutes.

Section 2024-78n as it appeared in Chapter 285, Laws of 1909, read as follows:

"Section 2024-78n. Any person, copartnership, association, or corporation doing business in this state as defined in this act, may incorporate as a state bank and may convert into a state bank, on or before September 1st, 1909, as provided in Section 2024-55 of the statutes."

It appeared in the same form in the statutes in 1921, except that for the words "as defined in this act," were substituted the words "as defined in Sections 2024-78l, 2024-78m and 2024-78n," as quoted in full on page 70 of our main brief. A correct understanding of these statutes and their effect can not be had from the limited discussion on page 14 of the brief of the defendants in error. We direct the court's attention, in this connection, to our discussion at pages 70 and 71 of our main brief.

The prohibition against private banking in Section

2024-78m is directed against private banking as defined in Chapter 285, *Laws of 1909*, now preserved in the three sections under discussion.

Before dropping this question, attention is called to the fact that loaning agents are left a wide opportunity by the proviso in Section 2024-78l to the effect "*that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal.*"

At page 15 of their brief, counsel for the defendants in error make this significant statement: "Wisconsin was compelled to abandon its taxation of moneys and intangibles and adopt the income tax system because the taxation thereof had proven a practical failure."

This statement contains a fallacy which is woven like a thread throughout the brief. Reduced to its last analysis, it means either that public sentiment would not permit of the taxation of moneyed capital falling within the description "moneys and intangibles," or that no effective method of reaching it had been devised. Congress did not make the condition thus imposed dependent upon the presence or absence either of a public sentiment permitting such taxation, or of effective means for its enforcement. If the state abandoned ad valorem taxation of other moneyed capital because public sentiment would not sustain it, then in that moment the state lost the right to tax shares of stock in national banks.

If we turn to the other horn of the supposed dilemma, that of the supposed inherent difficulty of finding and assessing intangible property, the answer is immediately at hand. When the state went over to the system of income taxation, it set up entirely new machinery for the purpose of reaching it. That machinery has been so worked out that every taxpayer is compelled to, and does report his

gross income in detail and the sources of that income. The law is being effectively administered. If the state had set up as effective machinery for the administration of the old law there can be no doubt whatever but that every last item of intangible property would have been disclosed by the owners and placed upon the assessment rolls. If, then, public sentiment would not have supported the administration of an ad valorem tax law, the state would thereby lose its right to tax national bank stock.

The same considerations which led Wisconsin and certain other states to go over to the income tax system as applied to moneys and intangibles, led Congress to the amendment of Section 5219 by the Act of March 4, 1923. Wisconsin, instead of meeting the new situation directly by adapting its income tax laws to the form of taxation permitted by the Act of March 4, 1923, has attempted to preserve ad valorem taxation as to national bank stock with the alternative that, if its statutes providing therefor "shall be finally adjudicated or determined" to be invalid in application to national banks, then each bank shall be assessed under the provisions of the income tax law in force during the period from the date of the passage of the law in 1923 until such adjudication or determination may be had.

If public sentiment will not sustain it, then no ad valorem tax may be laid on shares of national bank stock.

On the other hand, the fact that the state today, by the machinery developed in connection with the income tax law, has compelled the disclosure by every taxpayer in detail of the sources of his income, demonstrates that nothing stands in the way except the will of the people, now expressed by the Legislature, not to tax other moneyed capital.

III.

ERRONEOUS VIEWS AS TO "WHAT IS 'MONEYED CAPITAL'".

Under this heading, at pages 18 to 25 of their brief, counsel argue for a restriction of the words "moneyed capi-

tal" which would leave the condition exacted under the permissive statute applicable only to private banks and to corporate bank stock. Reduced to its last analysis, their argument is that such moneyed capital must be used in a *business*; that such *business* must be of a character *normally common* to the banking business; and that to be normally common to such business it must be carried on under restrictions of the same character as those imposed on national banks. In other words, the moment a competitor is left a wider freedom of action—is given a greater handicap in the race—he ceases to be a competitor.

At page 19, counsel say that in *First National Bank of Aberdeen vs. Chehalis*, 166 U. S. 440, and *Bank of Commerce vs. Seattle*, 166 U. S. 463, it was held that *purely personal* investments of individuals in interest-bearing securities did not constitute moneyed capital. We do not find this language in either decision. After using the term several times, counsel "quote" it at page 25, to the effect that moneyed capital does not include "*purely personal*" investments.

They have fallen into error typical of concentration overmuch on mere words. He who would pick out a guiding rule from a line of decisions should concentrate upon the substance of judicial action rather than upon the detail of the language used in laying the basis therefor.

By way of illustration, the first step toward the statement that moneyed capital to be within the statute must be "invested and employed in some *operation* (business) forming a *substantial* part of the *business* of banking" (Defendant in Error's Brief, p. 25, top), is a quotation from the *Mercantile Bank case*, 121 U. S. 138, italicizing the words "employed," "operations" and "capital" (Defendant in Error's Brief, p. 20). The two sentences there quoted are found in 121 U. S. 156 and immediately follow a sentence containing a definition of banking which will not support them and which, later on in their brief, counsel argue the court now to reject in part (Defendant in Error's Brief, pp. 30, 31).

Again counsel say that "the alleged competitive business must be such as is 'normally common' to the banking business" (Defendant in Error's Brief, p. 24, bottom). To lay the basis for this counsel set out quotations from *First National Bank of Guthrie Center vs. Anderson*, 269 U. S. 341; 46 Sup. Ct. 135, and *Merchants National Bank vs. Richmond*, 256 U. S. 635. In both, the term is used as descriptive of individual *investments* (not individual businesses) coming within the calls of the statute.

Again, after discussing the manner in which a bank deals with its capital in its business, counsel say that "moneys invested by individuals in bonds, mortgages and interest bearing securities must be 'employed in a similar way' by investment in either permanent (long term) or temporary (short term) securities with a 'VIEW to sale or repayment or reinvestment'" (Defendant in Error's Brief, p. 25). Here counsel interpolate their own interpretation of "permanent" and "temporary" investments. They realize that the rule as thus formulated by them does not require that the individual be engaged in any business. To meet this, they say: "To this should be added for the purpose of making money by the *operation*." For that they quote (Defendant in Error's Brief, p. 24, top) from a decision, not of this Court, but of the Circuit Court of Appeals for the Fourth Circuit in which the word *operation* is used as descriptive of the act of investing and not as descriptive of a business.

Our ultimate quest is the intent of Congress. We have Congressional interpretation both before and after the *Richmond* case. In 1916, Congress provided for organization of joint stock land banks. Their broad powers are discussed at length in *Smith vs. Kansas City Title Co.*, 255 U. S. 180, at pp. 203 et seq. It is significant that the suit arose on the bill of a shareholder in a trust company to enjoin the directors from *investing* its funds in *bonds* of Federal Land Banks and Joint Stock Land Banks. In the exercise of these broad powers, Congress, while permitting state taxa-

tion of their shares, chose to protect them against competition. It did so simply by making applicable to them section 5219, indicating the view that properly construed the words other moneyed capital as there employed would include any that might come into competition with them. They must have had in mind primarily the money invested in farm mortgages by individuals and in shares of stock in companies engaged in the business of loaning and selling loans on such security. (See our main brief, pp. 57 and 58.)

In 1923 Congress provided for the formation of national agricultural credit corporations with the power to issue trust notes or debentures with a maturity not exceeding three years and to pledge as security therefor any notes, drafts, bills of exchange or other securities held by them; and permitted the taxation of their shares or of the dividends derived therefrom or of their income in such manner as "is or may be authorized by law" in the case of national banking associations; and, also, provided that their debentures or other obligations might be taxed by the states, but that such taxation should not be at a higher rate than that applicable "to other moneyed capital in the hands of individual citizens thereof." Congress here classed these debentures and other obligations as "moneyed capital." Congress clearly understood that "other moneyed capital" included all bonds, notes or other evidences of indebtedness or other obligations of any kind that might come into competition therewith. (See our main brief, pp. 58 and 59.)

When Congress amended Section 5219 by the Act of March 4, 1923, it merely "put into express words that which, according to repeated decisions of this court was implied before," as said in *First National Bank of Guthrie Center vs. Anderson*, 269 U. S. 341; 46 Sup. Ct. 135, and the Congressional record discloses that this was likewise the understanding of Congress.

Congress *did not understand nor intend* that the inquiry would stop when it was ascertained that any given bonds,

notes or evidences of indebtedness were in the hands of individual citizens *not* employed or engaged in the banking or investment business. Neither did it understand or intend that the inquiry would stop when it was ascertained that they were merely personal investments. In that case there remained the further inquiry as to whether these investments were made in competition with such business. *What were excluded were those merely personal investments which were not made in competition with such business.*

Congress also gave, as we submit, an indication of its understanding as to corporations the stocks in which were to be deemed moneyed capital. It must be conceded that Congress understood and intended that the requirement that ad valorem taxation of corporate stocks coming under the description of other moneyed capital in sub-division (b) of Section 1 of the Act of March 4, 1923, would apply to the same corporations, a comparison with which is exacted of states choosing to tax corporate income under sub-division (c) of the same section. Those corporations are there described as "*other financial corporations.*" (For text of Act see our main brief, pp. 77 to 79.)

IV.

ARGUMENT ON COMPETITION REVIEWED.

At pp. 25 to 43, counsel argue that the business of (a) dealers in bonds, mortgages and securities, (b) acceptance companies and (c) building and loan companies are not "normally" common to banks and are, therefore, not competitive.

A. *Dealers in Bonds, Mortgages and Securities.*

They discuss first dealers in bonds, mortgages and securities. Their introduction (pp. 25 and 26) carries the same errors pointed out in our discussion of their statement of facts, pp. 1 to 9, *supra*. The evidence already discussed shows that there were individuals, firms and cor-

porations located both in and about Hartford and in Milwaukee and elsewhere in the state buying, selling, dealing in, and negotiating bonds, mortgages, securities, and industrial, governmental, municipal and real estate mortgage bonds and doing a loaning business. Their activities demonstrate the existence of a large body of individual investors in Wisconsin. When section 5219 was first enacted, Wisconsin was a borrowing state. Farms were being mortgaged and municipalities bonded to finance railroad building. Today, Wisconsin is sending capital east, as Grove says (R. 50), and west, as Sayles and Russell say (R. 58, 65). It is financing its own industries, meeting the borrowing needs of its farming communities and supplying capital to meet the same needs elsewhere.

Hence the large number of financial corporations now operating in the state.

For the purposes of their first argument under this heading, counsel assume that these individuals and firms, corporate or partnership, are merely in the business of trafficking or dealing in mortgages and securities; and argue that they are not in competition because a national bank is not authorized by law to carry on that business. Under the statute which they quote, national banks are given "all such *incidental* powers as shall be necessary to carry on the business of banking; by discounting and negotiating *promissory notes*, drafts, bills of exchange, and *other evidences of debt*" (Defendant in Error's Brief, p. 26). We submit that the power to discount and negotiate includes the power to buy and sell, and that a broader term descriptive of credits generally than "other evidences of debt" could not be found. We beg leave to direct attention to our discussion of this subject at pp. 55 and 56 of our main brief. We do not understand that this court has ever held that national banks have not the powers assumed for them by the comptroller there pointed out at p. 56. The only direct pronouncement on the subject which we have been able to find here is the

one holding that they may deal in "negotiable securities" issued not only by government and municipal corporations but "other corporations" (*Mercantile National Bank vs. New York*, 121 U. S. 138, 156), which counsel now ask the court to limit (Defendant in Error's Brief, pp. 30 and 31).

Discussing the statement of the Comptroller of the Currency that a great number of national banks now buy and sell investment securities and that his office has raised no objection because this has become a recognized service which a bank must render, counsel argue that the Comptroller has simply become a party to ultra vires transactions on the part of national banks. We submit that he is clearly right.

But assume for the purpose of argument that he is not. His statement indicates how effective this form of competition has become. The banks have been forced for their own protection to do the thing which counsel argue is ultra vires. Other financial corporations, by reason of the greater latitude allowed to them, are in many fields competing more effectively with national banks than are state banks with the restrictions which surround the latter.

Counsel argue that the typical dealer in bonds, mortgages and securities is a mere merchant (Defendant in Error's Brief, p. 33) and that dealers in bonds, mortgages and securities do not operate in any wise like private or incorporated banks.

Attention is respectfully directed to the discussion of real estate loans on page 11 of the report of the Comptroller of the Currency for 1924, in which he argues for greater freedom to the banks in the making of real estate mortgages. He says:

(P. 11.) "The argument which is most generally advanced against having long-term real estate securities in national banks is that they are not readily convertible. * * * There is a well-established and definite market for real estate mortgages. This market does not

cover mortgages of as short a term as one year, and, as a rule, the shortest term is five years. If the banks were able to carry these maturities of five years or over, they would then have the notes and mortgages in such condition that they could be disposed of to a wide clientele. A five-year mortgage is salable and convertible, whereas a one-year mortgage is not. On this account alone it is very possible that, instead of increasing the volume of frozen assets of banks, this longer period would produce greater liquidity and at the same time enable the banks to add very much to their services to their customers."

The mortgages they can not take gives them the hardest competition.

Attention is also directed to the charts on pages 13 to 15, giving the percentage of national bank resources to combined resources of national banks, state banks and trust companies from 1878 to 1924 (page 13), the growth in the number of banks (page 14) and the bank resources of national banks compared with state banks and trust companies (page 15). These charts show in a graphic manner the extent to which national banks are losing ground.

Attention is also directed to the discussion of legislation recommended at pages 1 to 4 of the Report of the Comptroller of the Currency for the year 1925. He says:

(Page 2.) "It is a misnomer to call this bill a branch banking bill. The measure proposes to amend the national banking laws in some 18 particulars, only 4 of which relate in any way to branch banking. The other provisions of the bill, such as the authority to lend one-half of the savings deposits upon the security of first mortgages upon improved real estate, the authority to hold their charter powers for an indeterminate period subject to the will of Congress, *the regulation of the investment security business*, and other pro-

visions of this measure will enable the national banks to carry on a modern banking business along the lines already approved by many State laws. * * * Their enactment [*i.e., of the proposed amendments*] into law would enable all national banks to meet more readily the competition from State banks and trust companies which have for a number of years had the authority to do what it is now proposed to confer upon the national banks." (*Italics ours.*)

That congress now entertains the same views as does the comptroller in respect to the power of national banks to invest and deal in "investment securities" is apparent from the text of the amendment of the national banking act now pending and the committee reports in connection therewith quoted in appendix B to this brief.

B. Acceptance Companies.

At pages 35 and 36 counsel discuss acceptance companies. They complain of the brevity of the evidence. It was not attacked either on cross-examination or by counter-evidence. Its substance is given in our main brief at page 14. At page 7, *supra*, we pointed out the errors in the treatment of the subject in the opposing brief. The key to the error in the argument of counsel is the misapplication of the term "normally common to the business of banking" as the test by which to determine whether the stock of a given corporation constitutes moneyed capital. Any "financial corporation," to paraphrase from the Act of March 4, 1923, or any investment company or investment banker or acceptance company, to use the designation now so familiar in the advertising pages of popular magazines, or any loaning company, comes clearly within the statute.

C. Building and Loan Associations.

At pages 37 to 43, counsel discuss building and loan associations. Their argument on this subject is based in the

main on a quotation from an opinion by the present Chief Justice of this court, handed down while judge of the circuit court in 1899, in the case of *Mercantile National Bank of Cleveland vs. Hubbard*, 98 Fed. 465.

Since 1899 the building and loan association has developed far beyond its original purpose. The building and loan association today affords not merely an opportunity for the borrowing of money by small property owners and home builders, but a means of investment for the owners of substantial amounts of moneyed capital.

We set up in Appendix A of this brief the material portions of the Wisconsin Statutes as they stood in 1921, dealing with loan and building associations. These associations are given the power to make loans to members (Section 2011). They may be organized with a capital stock of \$5,000,000, which may be increased an additional \$5,000,000. The capital stock is made payable in periodical installments called dues, not exceeding \$2 per share. When, however, the demand for loans exceeds the income of the association applicable for loans, then it may issue paid-up stock to an amount sufficient to meet such demand. When it shall have accumulated funds in excess of its requirement for loans, then such paid-up stock is retired in such manner as the by-laws provide or the board of directors may determine (Section 2011). Shares withdrawn, forfeited, retired or surrendered become the property of the association and in lieu thereof new shares may be issued (Section 2013). A member need not be a borrower (Section 2014). A member may withdraw his unpledged shares at any time by giving thirty days' notice, in which event he is entitled to receive the dues paid in by him and such proportion of the profits as the by-laws may prescribe within certain limitations (Section 2014-1). The Commissioner of Banking may, during time of war or whenever a national emergency exists, authorize an association to invest not to exceed five (5) per cent of its assets in bonds or other securities of the Federal Government (Section 2014-5a). A borrower may repay his

loan at any time by giving thirty days' written notice of his intention (Section 2014-6). Administrators, executors, guardians or trustees authorized to invest trust funds may acquire and hold paid-up stock (Section 2014-8b).

Since the decision of the Supreme Court of Wisconsin has been based in part on judicial notice, we feel justified in calling attention to the fact that according to the report of the Commissioner of Banking of Wisconsin on building and loan associations and credit unions for the year 1923 the total assets of building and loan associations are given for the year 1921 as \$56,792,364.84. He reports the ratio of increase of total assets for the years 1916 to 1923 to be 18%, 17.8%, 17.4%, 35%, 38.2%, 30.1%, 26.04% and 22.7%, respectively. According to the same report, he gives the total assets in 1923 as \$92,992,108.87. This means an increase during the two years of \$36,199,744.03.

At page 12 of the same report, the total number of associations in 1921 is given as 106. The total amount of dues paid on *installment stock* is given as \$26,121,986.67, and the total amount of *paid-up stock* held by the members is given as \$19,600,243.93.

In the same connection, we call attention to the report of the Comptroller of the Currency for the year 1921, at pages 3 and 4 after calling attention to the laws of California exempting savings deposits, he says:

"The result is that these State institutions, just before tax-listing periods, advertise that savings deposited with them are exempt from taxation, but subject to taxation if held in national banks. The result is that savings accounts are drawn from national banks and transferred to State institutions in great volume. Such seasonal and violent shiftings constitute an embarrassment to the banks, which must keep an abnormally large reserve in cash in order to meet the demands, thus making this excessive cash reserve unavailable for general business purposes. I fear that the exemption in favor

of building and loan companies will be an incentive to similar operations, to the disadvantage of banks and of the business community dependent upon them. Such seasonal withdrawals of savings accounts from the banks, particularly at such a critical time, must inevitably curtail greatly the ability of banks to serve the commercial interests dependent upon them."

At page 174 he calls attention to an unprecedented increase in the membership and assets of building and loan associations in the United States during the year 1920. He says: "There are in the United States 8,633 building and loan associations with assets aggregating \$2,519,914,971, which is an increase of \$393,294,581, or 18.49 per cent gain for the year."

In the table of statistics on page 175 he gives the number of associations in Wisconsin as 97, the total assets as \$43,-641,142 and the increase in assets as \$12,079,058.

The cases cited in this branch of the brief of the defendants in error at pages 37 to 43 are all based either on the quotation above referred to or discussions relating to the right of a state to exempt savings banks from taxation. As stated at the outset of our discussion under this heading, the building and loan association is a very different thing today from what it was in 1899. There is no true analogy between the modern building and loan association and the savings banks referred to in *Mercantile National Bank vs. New York*, 121 U. S. 138. Again, it is to be borne in mind that the savings bank exemption is justified as a matter of public policy. The building and loan association in Wisconsin is not accorded an exemption on this theory. A stockholder in the building and loan association is required to include his dividends in his income for taxation just as he is required to include his dividends derived from any other corporation which does not pay corporate income tax.

At page 43, counsel argue that there is no sufficient proof of competition by dealers in foreign exchange. It is immaterial whether the testimony on the subject covers four-

teen lines or fourteen pages. It is to the effect that there are individuals engaged in selling foreign exchange, that this is one of the functions of national banks and that this business comes into direct competition with national banks. It was not attacked either by cross-examination or by counter-evidence and the Supreme Court of Wisconsin can not, as suggested at page 43 of counsel's brief, dispose of this by considering that this testimony relates only to express companies.

V.

THE COMPETING INDIVIDUAL INVESTOR NEED NOT BE CONDUCTING A BUSINESS.

At pages 44 to 48, counsel argue that there are no individuals in Wisconsin who are "investing" in securities as a "business"; and that all investments are "personal." They proceed upon a technical definition of capital and argue that in order that any money invested by any individual at interest may be deemed moneyed capital, the individual must be maintaining a business. Their idea seems to be that an individual's investments never come within the competitive class until he becomes a banker receiving deposits and loaning, not only his own money, but the money of others.

There is today throughout the country and in all well settled communities such as we have in Wisconsin a large and increasing number of men who are in the investment field. Many of these, while continuing their ordinary occupations, are placing their funds at work in the investment field. There are many in every well established community who have dropped out of all other activities and are giving all of their time and attention to looking after their investments. These we commonly refer to as capitalists. All of these are using moneyed capital in competition with the business of national banks, and magazines and newspapers carry page after page of advertising matter addressed to them and to banks by so-called investment houses or investment bankers.

When they invest, they do so with a view to reinvestment in the event of sale or repayment. They are clearly in competition. When they enter the investment field they affect the loan field.

Mr. Homer B. Vanderblue, Professor of Business Economics at Harvard University, in his "Problems in Business Economics" (A. W. Shaw Company, 1924), says (p. 75) that the demand for long—and short—time use may be regarded as competing in the money market for the use of funds, and he illustrates this by charts. Summing up on this subject, he says::

(Page 76.) "Although the cyclical fluctuations in bond yields are thus very much less than those in commercial paper rates, they are, nevertheless, well marked and directly related to changes in other interest rates and general business conditions. When the business cycle enters the prosperity phase, the demand for funds for industrial enterprise becomes increasingly heavy. Commercial paper rates tend to rise. Investments in bonds are disposed of in the open market by banks, industrial concerns, and others to secure funds for business purposes, and as a result bond prices fall—that is, bond yields rise. During the liquidation and depression periods of the business cycle, on the other hand, the inactivity of trade decreases the demand for commercial loans, and funds are released for the purchase of bonds. Commercial paper rates fall, bond prices rise and yields fall. At such a time, commercial paper rates fall below bond yields, and it thus becomes more profitable to buy bonds than to loan money for short term transactions. Cheap money, in turn, tends to stimulate business and leads to a repetition of these movements of business and interest rates."

The argument at pages 49 to 56, in effect, leads to the conclusion that no one can be in competition with the loaning business of a bank unless they are able to do substan-

tially the same thing that banks do in receiving deposits. If that were logical, then there could be no competition with national banks except that received from banks of deposit.

An erroneous assumption of fact is made in the argument at pages 52 and 53 relative to the plaintiff bank's loans on real estate mortgages. An examination of the bank statements which were offered in evidence by the city will show that the loans tabulated at the top of page 53 were ordinary mortgage loans. The report covering April 28, 1921 (R. 143 and 143a), lists under the head of "Loans and discounts" (R. 143a) two items (g) and (f), aggregating \$33,325, which are tabulated in schedules 6 and 7. Counsel then argue that these must be assumed to include real estate mortgages purchased from the Wisconsin Securities Company, citing R. 56. The record does not bear them out. Liver at this point, was testifying as to farm mortgage bonds.

At pages 64 to 67, counsel argue that the Wisconsin Statute is not void on its face and that to avoid the tax proof must be made of the existence of other moneyed capital in substantial amounts. It was the purpose of Congress in providing for the organization of national banks to encourage their establishment and the investment of moneyed capital therein. It was with this purpose in mind that Congress imposed the condition of the taxation of other moneyed capital, in granting permission to tax the shares of stock. The moment a state passes a law exempting all moneyed capital from taxation, except that invested in incorporated banks, it thereby defeats the primary purpose which Congress had in mind. Where Congress would encourage the establishment of national banks, the state discourages their establishment. The purpose of Congress is just as effectively, if not more effectively, defeated in a state, if we can imagine one, in which there is not as yet any substantial amount of other moneyed capital, as in the state in which it may be found in great quantity. The basic ground of the

attack on the tax is the violation of the Federal Constitution by the taxing law.

Congress provided that the state might tax national bank stock if it taxed other moneyed capital at a rate equally as high. Wisconsin attempted to tax the stock but exempted other moneyed capital. Since the state thus in the express language of the law refuses to comply with the condition imposed, it violates Section 5219 in and by the law itself. Congress must have intended to select for the comparison an element the existence of which might fairly be presumed in every state of the Union. Otherwise, its non-existence in any state would permit that state to tax national banks out of existence.

Investors attempt to forecast the future. They cannot and will not ignore the existence of unfriendly and discriminating legislation. The deterring influence on the prospective investor is as effective while other moneyed capital is non-existent as after it actually comes into existence. The state law carrying such discrimination on its face must of necessity operate to discourage the formation of national banks and the free flow of capital thereto, notwithstanding the present non-existence of other moneyed capital.

VI.

ARGUMENT OFFERED TO EXCUSE NON-COMPLIANCE, PROVES NON-COMPLIANCE.

In Part II of their brief, pages 76 to 97, counsel say that historically and economically considered the "Wisconsin system," consisting of the prohibition of all private banking, the taxation of all incomes and the exemption of moneys, credits and intangibles from ad valorem taxation, neither injures nor discriminates against national banks. They say that down to the time of the passage of the income tax law

the state was not taxing other moneyed capital, the statutes providing therefor notwithstanding. They say that this was because it was not practicable to enforce the law. That is another way of saying that public sentiment would not sustain such taxation. They then say that because these intangibles are now reached and, through the medium of the income tax law made to bear a larger portion of the burden of taxation than they had theretofore, and banks are not so unfairly discriminated against as they were before, they should not be heard to complain. If public sentiment would not sustain the administration of the old law, then ad valorem taxation of intangibles would have been frankly abandoned and with it would have gone the right of the state to tax shares of stock in national banks. It is no answer to a charge of discrimination against national banks to say that the discrimination is not as bad as it was before 1911. The entire argument under this heading is one which might properly have been addressed to Congress with a view to obtaining permission, in states using the income tax, to apply that tax in respect to national banks and their stockholders. It was those considerations which culminated in the Act of March 4, 1923. Instead of justifying, it condemns the course followed by the State of Wisconsin at all times after 1911.

Counsel cite the 1914 report of the Wisconsin Tax Commission showing that as the result of the investigation of 473 estates, taxable securities had been assessed at 31½% of their true value (Defendant in Error's Brief, p. 91). At page 58 of the same report, is found a table of state and local assessments by classes of property for the years 1911 to 1914. The last year in which an assessment of moneys and credits was found was 1911 and the state assessment in that year for bank stock was \$49,584,598, while the assessment for moneys and credits was more than three times that, or \$150,930,603. If the ratio of assessment were that indicated in the portion of the report to which attention has just been directed, it would mean that there was in the

state at the time between \$4,500,000,000 and \$5,000,000,000 of moneys and credits.

A table compiled from the report of the Wisconsin Commissioner of Banking for the years 1911 and 1921 is set out on page 94 of the brief of the defendants in error. The approximate percentage of increase in the number of state banks was 52% and in national banks 25%. The increase of capital of state banks was 107% plus, while that in national banks was 41% plus. The increase in surplus of state banks was 173% plus, while that in national banks was 86% plus.

At pages 95 and 96 is found a discussion comparing the tax burden on \$10,000 invested in stock of the plaintiff bank with that on \$10,000 invested at interest. It is said that as the bank dividends for 1921 were 15%, it would mean a return of \$1,500 on \$10,000 invested in stock of the plaintiff bank. According to the facts assumed for the purposes of their discussion, \$10,000 would purchase \$4,000 par value of stock of the plaintiff bank and the return on that would be, not \$1,500, but \$600. We might add, also, that under the laws of Wisconsin a taxpayer having \$10,000 invested at interest at 6% would merely pay an income tax on \$600. This was subject to possible reduction or entire elimination by (1) the offset of his tangible personal property tax, (2) personal exemptions, (3) losses, or, (4) reduction of net income so as to bring the lowest rates into play.

Respectfully submitted,

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APPENDIX A.

WISCONSIN BUILDING AND LOAN ASSOCIATION STATUTES.

POWERS. SECTION 2011. Such local associations shall have power:

(1) To issue stock to members; to assess and collect from members fees, dues, fines, interest, premiums and other charges, and the same shall not be held to be usurious; to permit or force members to withdraw all or part of their stock; *to make loans to members*; all upon such terms and conditions as may be provided in the by-laws.

* * *

(5) To exercise all such powers as are necessary and proper to enable them to carry out the purposes of their organization.

CAPITAL; SERIES. SECTION 2012. The *capital stock* of any such association shall not exceed *five million dollars*, except that when any association shall have issued stock to the amount of ninety per cent of its authorized capital it may amend its articles of incorporation to provide for an *increase of capital not exceeding five million dollars*; the same may be divided into two or more classes. Stock in any class may be made issuable at any time or in successive series, in such amount as may be provided in the by-laws, or in the absence of such provision, as the directors may determine. If issued in successive series no series shall exceed five hundred thousand dollars nor one-tenth of the aggregate capital stock. The capital stock shall be divided into shares of a par value of not less than fifty dollars nor more than two hundred dollars each, payable in periodical installments, called dues, not exceeding two dollars each per share. *When the demand for loans exceeds the income* of the association applicable for loans, then *the association may issue its paid-up*

stock to an amount sufficient to meet such demands for loans. When such association shall accumulate funds in excess of its requirements for loans, then such paid-up stock shall be retired in such manner as the by-laws provide or as the board of directors may determine.

CANCELLATION OF STOCK; INTEREST ON PREPAID DUES. SECTION 2013. Whenever any shares are withdrawn, forfeited, retired or surrendered the certificate or certificates therefor shall be surrendered and cancelled, and such shares shall thereupon become the property of the association, and in lieu of the same new shares may be issued. * * *

FORFEITURE OF SHARES. SECTION 2014. *If a member not a borrower be in arrears for more than six months for dues, his shares, at the option of the directors, may be declared forfeited.* * * *

WITHDRAWAL. SECTION 2014-1. *A member may withdraw his unpledged shares at any time by giving thirty days' written notice of such intention, and shall then be entitled to receive the amount of dues paid in by him, and such proportion of the profits as the by-laws may prescribe, less all fines, charges and losses accrued or contingent to the time of the notice of withdrawal, as the board of directors may determine, with no dividends, interest or profits from the time of such notice. Provided, however, that the amount of dividends, interest or profits paid shall not exceed the earnings apportioned or credited to the shares of stock withdrawn, and further, that at no time shall more than one-half of the funds in the treasury be applicable to the demands of withdrawing members without the consent of the directors.*

WAR EMERGENCY INVESTMENTS. SECTION 2014-5a. The commissioner of banking may, during a time of war or whenever a national emergency exists, in

writing authorize an association to invest its funds, not exceeding five per cent of its assets, in bonds or other securities of the government of the United States of America.

LIBERTY BOND INVESTMENTS VALIDATED. SECTION 2014-5b. All investments heretofore made by any association in United States liberty bonds and war savings stamps are hereby validated.

PAYMENT OF LOANS. SECTION 2014-6. A borrower may repay his loan at any time by giving thirty days' written notice of his intention. He shall be charged with the amount of the original loan and interest premium and fines in arrears, and be given credit for the withdrawal value of his shares pledged as security. The balance shall be received in full satisfaction of said loan, and the shares thus credited be canceled and revert back to the association. All settlements made at periods intervening between stated meetings of the directors shall be made as of the date of such meeting next succeeding such settlement. *A borrower may repay his loan at his option without claiming credit for said shares, whereupon said shares shall be retransferred to him freed from all claim by reason of said loan. • • •*

TRUST FUNDS MAY BE INVESTED IN PAID UP STOCK. SECTION 2014-8b. An administrator, executor, guardian, or trustee, authorized to invest trust funds, may acquire and hold paid up stock as such, in a building and loan association of this state, but shall in no event exceed the limitations prescribed in subsection 2 of section 2100b of the statutes, and shall have the same rights and be subject to the same obligations and limitations as other stockholders except the right to become a director or officer of an association. Stock issued to an administrator, executor, guardian, or trustee shall specifically name the trust represented.

(All italics ours.)

APPENDIX B.

Excerpts from Congressional Record and Committee reports on pending amendment to banking law.

In the so-called "McFadden Bill" (H. R. 2), passed by the House of Representatives on February 4, 1926, providing for certain amendments of the national banking laws, it was proposed to amend Section 5136 by adding a proviso reading as follows:

[Congressional Record for July 8, 1926, Appendix p. 12923] "(b) That Section 5136 of the Revised Statutes of the United States, subsection 'seventh' thereof, be further amended by adding at the end of the first paragraph thereof the following:

"*Provided*, That the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation, in the form of bonds, notes, and/or debentures, commonly known as investment securities, under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency, and the total amount of such investment securities of any one obligor or marker held by such association shall at no time exceed 25 per cent of the amount of the capital stock of such association actually paid in and unimpaired and 25 per cent of its unimpaired surplus fund, but this limitation as to total amount shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof, or obligations issued under authority of the Federal farm loan act.

* * * * "

The report of the House Committee on banking and currency, dated January 12, 1926, and of the Senate Committee, dated March 25, 1926, discussed this proviso in the same language as follows:

"Subsection (b) This subsection is divided into two provisos, each of which recognizes and affirms the existence of a type of business which national banks are now conducting under their incidental charter powers. They may be said to liberalize, in that they confirm the conduct of this character of business; on the other hand, they are restrictive in that the business is confined to definite limits by law.

"The first proviso referred to recognizes the right of national banks to continue to engage in the business of buying and selling investment securities, but at the same time it makes a general definition of the term 'investment securities' and gives the comptroller the authority to make a further definition by regulation. This would give the comptroller the authority to exclude by definition the right of a national bank to purchase undesirable or unsafe investment securities. This provision also limits the total amount which a national bank may take of any one issue of such securities to 25 per cent of its capital and surplus. In this connection it may be noted that this is a business regularly carried on by State banks and trust companies and has been engaged in by national banks for a number of years. The national banks hold today in the neighborhood of \$6,000,000,000 of investment securities. The effect of this provision, therefore, is primarily regulative."

The two Houses not having been in agreement on another feature of the bill, it remained in conference until the convening of the next session in December, 1926. (Congressional Record, page 12922.)

First For Defendants In Error

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 186

Office Supreme Court

FILED

NOV 29 1922

Wm. R. STAMER

**FIRST NATIONAL BANK OF HARTFORD,
WISCONSIN,**

PLAINTIFF IN ERROR,

vs.

**CITY OF HARTFORD AND STATE OF WISCONSIN,
DEFENDANTS IN ERROR.**

**IN ERROR TO THE SUPREME COURT OF THE STATE OF
WISCONSIN.**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 186

**FIRST NATIONAL BANK OF HARTFORD,
WISCONSIN,
PLAINTIFF IN ERROR,**

vs.

**CITY OF HARTFORD AND STATE OF WISCONSIN,
DEFENDANTS IN ERROR.**

**IN ERROR TO THE SUPREME COURT OF THE STATE OF
WISCONSIN.**

BRIEF FOR DEFENDANTS IN ERROR.

For brevity we shall refer to the plaintiff in error as "plaintiff" and the defendant in error City of Hartford as "defendant".

Counsel for plaintiff iterate and reiterate with such great persistence that the undisputed evidence shows the existence in Wisconsin of competitive moneyed capital, and draws such erroneous conclusion from the undisputed evidence, that we feel compelled to make our own statement of facts.

STATEMENT OF FACTS.

A *topical* grouping of facts is helpful.

Unless otherwise stated the facts set forth all relate to the year 1921, the year of the tax herein involved.

The testimony on the question of "moneyed capital" and "competition" is given entirely by the witnesses Liver, President of the plaintiff bank, and Grove, Treasurer of First Wisconsin Company, a bond and investment company; Schauer, Secretary and Treasurer of Hartford Building and Loan Association; Sayles and Russell, dealers in real estate mortgages; Leins, Register of Deeds.

1. *Bank Facts.* Capital stock of plaintiff bank, \$50,000.00 (R. 31); Surplus, \$50,000.00 (R. 32); Total Deposits, \$950,000.00; Certificates of Deposit, \$322,000.00; Savings Deposits, \$249,000.00; Open Account Deposits, \$318,000.00 (R. 34);

The bank buys and sells mortgages and loans on mortgages, *but that is not a very large part of its business*, (R. 26); engaged in negotiating mortgages; have turned over mortgages to clients (R. 45); have *not* been in the business of *selling* mortgages, but have taken them and turned them over to clients (R. 45).

In 1920 and 1921 it obtained about \$30,000 or \$40,000 of farm mortgage loans from Wisconsin Securities Company of Milwaukee, which it sold (R. 56).

The bank buys and sells government bonds and securities; buys those bonds for their own investment and to accommodate clients; disposes of a good many to individuals, (R. 26); buys municipal bonds for its own investment; bought \$15,000 or \$20,000 Washington County bonds at one time; had about \$30,000 or \$35,000 in municipal bonds (R. 40); sold municipal bonds mostly to local clients (R. 44). Bank carries these bonds as capital assets. They are *not* figured with un-

divided profits and surplus (R. 45). The bank has some investments in corporate bonds.

The capital stock, surplus and undivided profits of national banks in the State of Wisconsin in 1921 amounted to between \$50,000,000 and \$55,000,000; state banks between \$55,000,000 and \$60,000,000 (R. 49). The amount of money invested in bonds and other investments in the State of Wisconsin exceeded many times the amount invested in national banks in Wisconsin (R. 49).

2. "*Lenders*" on *Real Estate Mortgages* and "*Dealers*" in *Mortgages*. In view of the legal questions herein later discussed it is necessary to properly analyze the testimony.

As to "lending" on mortgages and "dealing" in mortgages, the testimony consists of that given by Liver, Sayles, Russell and Grove. Russell runs a so-called insurance and loan business. He loans money *for* private parties on mortgages and bonds secured by mortgages. The mortgages are given on North Dakota land and average from three to five years in maturity (R. 65). It thus appears that he is not lending his own money, but merely acts as a lending agency or else he buys the Western mortgages and sells them to Wisconsin parties.

Sayles' business is that of *selling mortgages* in Hartford and vicinity (R. 57). Has sold about \$500,000 worth in ten years. Practically all of the mortgages were Western mortgages bearing about 6% interest. He did not negotiate the loans himself, but purchased the mortgages from bank and loan companies such as Peters & Company, Central Mortgage Company and Interstate Securities Company, all of Minnesota. The mortgages average five years maturity (R. 58). It thus appears that Sayles is a mere *dealer* or *merchandise* in mortgages on western lands which he procures in the West and merely sells in Hartford and vicinity.

Liver's testimony is not so very definite as to how these mortgage people do business, but when coupled up with the

other testimony the nature of the business is apparent. He says that there are individuals in Hartford "*selling notes and mortgages*" (R. 26). These consist of Ed. Russell and Charles Sayles (above referred to). Referring to Sayles he speaks of him as being in the "loan business" (R. 27), but he does not distinguish between *loaning his own money* on mortgages and acting as *agent* for others in lending money, nor in the *buying and selling* of mortgages. He refers to this general class of mortgage men in this language—"they receive money from their clients and put it in the bank or loan it to someone else", and Mr. Sayles does this (R. 39). He says that one Thoma "is engaged in loaning out money in the City of Hartford", but when this is coupled up with the above statement (R. 39), he evidently means that they are loaning money for their clients and acting as agents or purchasing and selling mortgages. He then makes a general statement that there are real estate firms loaning out money to individuals in that community on real estate and names Sauerhering & Gehl (R. 27), but he makes no statement as to the *method* in which they do business, that is, as to whether they are loaning their own money or merely act as agents and loan on a commission or whether they buy and sell mortgages. In view of the testimony as to the way the other real estate men are handling mortgage loans, it is inferable that they do business in the same manner. He estimates that the loans made by the various parties named by him would run from \$250,000 to \$300,000 (R. 27). He is later cross-examined with reference to his statement of about \$250,000 loaned in a year and he says—

"Q. Where were these loans principally made?

A. Western country." (R. 39 and 40.)

While this statement is made immediately after his examination as to building and loan associations, the second question prior to that evidently shows that the questioner is referring to the statement made by the witness (R. 27) as to the amount of loans that were made in a year by these local con-

cerns outside of building and loan associations. He says that there are Chicago and Milwaukee concerns that are engaged in "buying and selling * * * mortgages * * * " in that community (R. 28). This is evidently a merchandising transaction.

He makes a short statement as to the operations of a company known as the Ziegler Company located at West Bend. He says that this company is engaged in the "real estate and loan business" and does a large amount of loan business in Hartford through an agency by circularizing and soliciting their loans, and this business runs up in the thousands of dollars (R. 30). No statement is made as to whether they are using or *lending their own money*, nor as to whether they are acting as a mere *lending agency* or are *buying and selling mortgages*, nor as to the *location of the lands mortgaged* or the maturity or any other facts *which would establish the competitive nature of the business*. In the absence of testimony on these points the inference is permissible that Ziegler & Company are doing business in the same manner as the other local real estate and mortgage dealers and agents.

Most of these local mortgage dealers and agents deposit the moneys they handle with the plaintiff bank or have savings accounts with that bank (R. 39).

Grove's testimony as to real estate mortgages is brief. He merely says that there are many individuals engaged in *selling mortgages* (R. 50).

Leins, the Register of Deeds, testified that in 1921 there were mortgages running to individuals in the total amount of \$1,507,810.54 (R. 57). No statement is made as to the maturity terms of these mortgages, nor as to what amount, if any, thereof was on improved or unimproved lands, nor as to the percentage of the amount loaned to the value of the property, nor as to what percentage ran to individuals and what to corporations. Investment of industrial corporation's

surplus moneys in mortgages is not "moneyed capital in the hands of *individuals*".

People vs. Commissioners, 4 Wallace 244.

National Bank vs. Boston, 125 U. S. 60.

Therefore, it is impossible to ascertain whether any of them are such that a national bank could, or would, take, nor that they are *competitive*. Not only that, but *presumably* the mortgages are all *personal investments*.

3. *Dealers in Bonds, Notes and Stocks*. Liver testified that there were Chicago and Milwaukee concerns "engaged in *buying and selling* securities, mortgages, notes and bonds in that community" (R. 28). They were real estate, public utility and municipal bonds.

Grove testified that his company, the First Wisconsin Company of Milwaukee, was engaged in the underwriting, wholesaling and general distribution of bonds and securities—so-called bond dealers. In 1921 that company did many million dollars worth of business in the *sale* of bonds and securities (R. 46). He names many other individuals and companies engaged in the same business (R. 47). A great proportion of the bond issues were secured on properties outside of the state. Therefore, the money was loaned to *non-residents* (R. 50). Stockholders of Milwaukee corporate bond houses are largely Wisconsin citizens. Some of the companies named are partnerships in which the partners are residents of Milwaukee (R. 51). First Wisconsin Company is affiliated with the First Wisconsin National Bank, the largest bank in Wisconsin. Its officers and directors are the same (R. 51). This bank organized the First Wisconsin Company to take over two of the alleged functions of the bank (R. 48 and 51). The First Wisconsin Company's capital stock is \$600,000 preferred and 10,000 shares of no par value common stock (R. 48). The record is silent as to whether this stock is held either directly by the bank or in trust for

its stockholders. The creation of this subsidiary or affiliated bond company by the largest bank in Wisconsin suggests at least a doubt by this bank as to the power of national banks to engage in the *merchandising of bonds and securities*.

4. *Building and Loan Associations.* There is no testimony as to the operation of building and loan associations excepting that of the Hartford Building & Loan Association. This association loans money (R. 27 and 29). *Loans are permitted only to farmers and home-owners who must be members* (R. 52). Any individual without restriction may purchase a paid-up stock certificate and become a member (R. 52, 53). He may cancel his certificate on thirty days' notice and withdraw what he has invested. If he withdraws his money he is paid the prevailing rate of interest which in 1920 was 5%. While he holds his stock he receives dividends payable on the last days of June and December (R. 53). A member may purchase a certificate of stock on the installment plan. If he purchases on the installment plan and withdraws within a year he is penalized by being allowed no dividends. If he withdraws after the year he will receive 70% of the dividends granted (R. 54). Evidently the stock certificate of any holder who is not a borrower matures at some date, at which time he is compelled to surrender his stock (R. 54). The funds of the association are used for mortgage loans (R. 54). As above set forth (R. 52) loans are only made to members. The outstanding loans of the association at the end of 1921 were \$136,664.86 (R. 54). The amount of the paid-up stock was \$77,502.71 and the installment stock \$43,691.85 (R. 55).

The current funds of the association are deposited with the plaintiff bank at Hartford and placed in a checking account. That bank has done all of the association's business since it was organized (R. 55). Sometimes the checking account runs as high as \$14,000.00 (R. 56).

5. *Acceptance Companies.* The sole testimony as to acceptance companies consists of a brief statement given by Mr. Grove (R. 50). He says that these companies compete with the national banks by lending money and discounting commercial paper. They handle large sums. He does not describe the nature of the business. No evidence is given as to the maturity of the paper; whether it is payable in installments; whether it is secured by conditional sales agreement or chattel mortgages on automobiles and other similar articles; no testimony as to whether the bank handles similar business themselves.

6. *Foreign Exchange.* Grove in fourteen lines of testimony says that there are individuals in Wisconsin engaged in selling foreign exchange. He does not say who they are or make any statement or reference to the quantity of the business excepting that he says the American Express Company is engaged in that business. He says the selling of foreign exchange is one of the functions of national banks and therefore there is direct competition (R. 50).

7. *Personal Investments in Bonds, Securities and Other Investments.* Grove testifies that there are personal investments in Wisconsin in bonds, securities and stocks running into millions of dollars and that a substantial portion of these investments are held by individuals (R. 48, 49). The capital stock, surplus and undivided profits of national banks in Wisconsin in 1921 was between \$50,000,000 and \$55,000,000 and state banks between \$55,000,000 and \$60,000,000 (R. 49). The amount of personal investments in bonds and so forth exceeds the amount invested in national banks many times (R. 49). Neither Grove nor any other witness testifies to any fact which would show that these investments are other than strictly personal investments within the definition of the latest decision of this court.

8. *Loans on Short Term Paper Similar to Bank Loans.* There is not a syllable of testimony in the record that there

are in Wisconsin any individuals making loans on short term paper secured by endorsement or collateral in the manner in which banks make their ordinary loans, or that there is any competition to any extent whatever in this respect.

9. *Private Banks.* There are no private banks in Wisconsin as they are prohibited by law as is hereinafter set forth. The Wisconsin law prohibits any individual or corporation from employing the word "bank" in its name unless it incorporates as a state bank. While it may be debatable (hereinafter discussed) as to whether an individual or private corporation not using the name of "bank" may set up a place of business and carry on the business of *discounting short term paper or making loans similar to ordinary bank loans*, there is no testimony in the case to show that any corporation or individual is engaged in such business to any extent whatever.

10. *How "Moneyed Capital" Competes with Banks.* Liver and Grove evolved a remarkable theory as to competition. In our discussion we use the word "competition" in the sense of doing a business which a bank is authorized to do and normally does in carrying on its banking business. Liver's testimony in substance is as follows:

When the loan men and the Building & Loan Association draw their money from the bank in substantial amounts these withdrawals affect the bank's loaning department. When dealers in bonds, notes, mortgages and stocks sell, and the depositors *withdraw* the money from the bank, such as savings accounts and time deposits, and thus *reduce the bank's fund*, this is competition, although the witness does not know whether this money gets back into the bank again immediately in some other form (R. 28).

Grove's theory and argument is as follows:

There is competition for capital and competition for money which would ordinarily be on deposit with the bank. Banks must sell stock to get money and someone has to fur-

nish the money. If those who would otherwise invest in bank stock use their funds for other investments the bank is deprived of an opportunity to obtain capital and in that sense there is competition (R. 48). He says there is competition for business between banks and bond-holders because banks are authorized to buy and sell securities. (This is an erroneous assumption as will hereinafter appear). As lending money is a bank function investment houses who sell securities come in competition with the bank. Money of individuals awaiting investment is on deposit with the banks and then when these individuals invest in bonds *they withdraw from the bank and this is a competition for funds* (R. 48, 49).

Liver testifies that the building and loan associations compete because they receive deposits and make loans and pay a higher rate of interest than the bank (R. 29). He is in error as to their receiving deposits unless the selling of membership certificates, either paid-up or in installments, constitutes the receiving of deposits. He refers to the local mortgage dealer's business of \$225,000 or \$250,000 a year whose loans are made principally in the western country (R. 27, 39, 40). He does not claim that these real estate mortgage loans have affected the value of the bank ^{and} (R. 40). Obviously, a loan on a Minnesota or Dakota mortgage is one that a local Wisconsin bank could not have made and therefore is not competitive. Witness has noticed the withdrawals by individuals for investment purposes over a period of ten or twelve years and if these withdrawals had not been made the loaning power of the bank would be strengthened (R. 40, 45). He admits that the local real estate mortgage dealers and the building and loan association deposit their moneys in the plaintiff bank, together with the moneys they receive from clients, and thereby the bank benefits therefrom (R. 39). Other than the foregoing there is no testimony as to how the alleged "other moneyed

capital" competes with the normal functions and business of a national bank.

THE DECISION OF THE TRIAL COURT.

This action was a law action brought to recover an illegal tax paid under protest. It was tried by the Circuit Judge of Washington County, Wisconsin without a jury. The court made findings of fact and conclusions of law (R. 17-19). The fifth finding of fact was a general one in the following language:

"That during the year 1921 there was a very large amount of moneyed capital in the hands of individual citizens of said city of Hartford, running into many hundreds of thousands of dollars, that was neither assessed for taxation nor taxed, which entered into competition with the banking business, including the banking business of the plaintiff.

"That during said year, 1921, there were vast amounts of moneyed capital in the hands of individual citizens of this state, running into millions of dollars that entered into competition with the banking business, that under the provisions of said section 70.11 subsection 10, were wholly exempted from taxation."

The pertinent conclusion of law was as follows:

"The tax so in form levied and assessed against said shares of stock was unauthorized, illegal and void in its inception, and in violation of, and repugnant to, the provisions of section 5219 of the Statutes of the United States pertaining thereto; and the taxing officers of the defendant city were without power or authority to assess the said shares for taxation or to levy any tax against the same."

The Supreme Court of Wisconsin held, in accordance with its previous rulings, that the findings were *general* and that such findings are not binding upon the supreme court but the court is permitted to consider the facts in the case as an original question (R. 76). Previous similar rulings on this question were as follows:

Chippewa Bridge Company vs. Durand, 122 Wis. 85;

Weinhagen vs. Hayes, 174 Wis. 233.

BRIEF STATEMENT OF WISCONSIN'S BANKING AND TAXATION LAWS.

A more detailed discussion of these laws, and the fruitless efforts of the state of Wisconsin to tax moneys and intangibles, will be set forth in another part of this brief but a brief statement at this point is advisable to assist the court in the following discussion in relation to some of the questions raised by brief of plaintiff in error.

Since the early history of Wisconsin it has exercised the privilege given it to tax national banks under the enabling authority as now set forth in Section 5219 of the United States Statutes. This statute, after amendment by Chapter 72 of the Laws of 1903, persisted in substantially the same form down to 1921, and is set forth as Appendix C in brief for plaintiff in error at page 79. This section together with sections 70.37, 70.38, 70.39, and 70.40 appear as sections in a general Chapter entitled "Assessment of Taxes".

Up to 1911 the same chapter provided for the taxation ~~tax~~ of personal property and section 1036 defined personal property to include all debts due including "moneys and effects of any nature or description having any real or marketable value".

In 1911 by chapter 658 the Wisconsin legislature adopted its income tax system and amended section 1038, which was

a part of the chapter entitled "Assessment of Taxes" relating to exemptions, and included in the exemptions the following:

"All moneys or debts due or to become due to any person and all stocks and bonds including bonds issued by any county, town, city, village, school district or other political subdivision of this state, not otherwise specially provided for."

In 1911—when the income tax law was adopted and intangibles were exempted—*national banks were not authorized to loan money on real estate mortgages*. The first statute giving national banks such authority was the Federal Reserve Act, adopted in 1913, and as amended in 1916 and 1918, will be found in Federal Statutes Annotated, Supp. 1918, p. 472, being Sec. 24 of the Act.

Up to 1909, while incorporated and private state banks were under strict statutory regulation, there was no prohibition against private or unincorporated banking business. By chapter 285 of the Laws of 1909 the Wisconsin banking law was amended by the adoption of two new sections, now known as sections 224.02 and 224.03 of the Wisconsin Statutes of both 1923 and 1925, which sections read as follows:

224.02:

"The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing, provided that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal."

224.03 :

"It shall be unlawful for any person, copartnership, association, or corporation to do a banking business without having been regularly organized and chartered as a national bank, a state bank, a mutual savings bank, or a trust company bank. Any person or persons violating any of the provisions of this section, either individually, or as an interested party in any copartnership, association, or corporation shall be guilty of a misdemeanor and on conviction thereof shall be fined in a sum not less than three hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail not less than sixty days nor more than one year, or by both such fine and imprisonment."

Since prior to 1909 there has been in existence what is now section 221.49 of the Wisconsin Statutes of 1923 which prohibits any person, partnership or corporation not subject to supervision and examination by the Commissioner of Banking to use the word "bank" on an office sign or on letterheads, bill heads, notes, receipts, etc., or in any wise to indicate that his or its business is the business of a bank.

In 1910 the Wisconsin Supreme Court in the case of *MacLaren vs. State*, 141 Wis. 577 held that the first section above quoted prohibited the department stores from accepting moneys on deposit on which interest was payable. The Commissioner of Banking has also ruled that the statute prohibits the organization by an industry of a department for the encouragement of thrift which involves the acceptance of deposits from their employees. See opinion of Supreme Court in this case—R. 75. This distinguishes the Wisconsin situation from the Minnesota situation as appears from the case of *State of Minnesota vs. First National Bank of St. Paul*, Docket 31543, argued herewith. Therein it appears a large amount of moneys are received on deposit by mercantile and industrial concerns from their officers and employees. (See

Record in that case, pp. 126, 130). In the *MacLaren Case* it is held that we have no banks of issue or circulation in Wisconsin because the Wisconsin law does not permit its banks to issue paper money. (See page 580.)

The banking business is specially protected by other statutory and constitutional provisions. Banking laws must be passed by a two-thirds vote of the members of each house (Wis. Const. Art. II, Sec. 4). The danger of excessive competition between banks is safeguarded. No new bank can be organized in any community unless the Banking Commissioner shall determine, among other things, that "public convenience and advantage" will be promoted by permitting the Bank to organize. Wis. Statutes, 1925, Sec. 221.01, sub. L.

Wisconsin was compelled to abandon its taxation of moneys and intangibles and adopt the income tax system because the taxation thereof had proven a practical failure.

See later discussion.

See opinion Wisconsin Supreme Court this case—R. 74.

As to general failure of all efforts to tax moneys and intangibles on an ad valorem basis, see the following:

Bank vs. Mayor, 100 Fed. 24. (C. C. A.)

State vs. First Nat. Bank of St. Paul, 204 N. W. 874.

Since 1911 in addition to the system of bank taxation, the state of Wisconsin has had the following system of taxation:

1. General property tax which includes real and personal property other than moneys, credits and intangibles.
2. Corporation taxes on public utility companies.
3. License taxes on the gross earnings of telephone and insurance companies.
4. Income taxes.
5. Inheritance taxes.

6. Occupation taxes on the operation of coal docks and elevators.

7. By the income tax law of 1911 the income of state and national banks, mutual savings banks, trust companies, mutual loan corporations, building and loan associations and certain cooperative associations were exempt from the payment of an income tax but all other corporations were required to pay the income tax.

See decision of Wisconsin Supreme Court—R. 76.

DECISION OF THE WISCONSIN SUPREME COURT.

The Wisconsin Supreme Court decided in substance as follows :

1. In the enactment of the Wisconsin statute there was no unfriendly discrimination or hostile intent on the part of the State of Wisconsin against national banking associations.

2. The restriction in the federal statute against taxing the shares of national banks at a greater rate than "other moneyed capital in the hands of individual citizens" is applied to moneyed capital in "competition" with national banks, which is any material amount of moneyed capital engaged in a *business* which bids against national banks for *business which they are authorized to do*, "competition" being opposed to monopoly and involving the idea of striving to obtain the same thing.

3. Capital invested in building and loan associations is not in competition with national banks.

4. Brokers and dealers in bonds, mortgages and securities not being bankers as indicated by section 221.49 of the Wisconsin statutes are not in competition with national banks as national banks are not *authorized to traffic* in mortgages, bonds or securities except as *incident* to their principal business.

5. Merchandisers of securities are not bankers and all persons doing a banking business in Wisconsin are required to organize as banks.

6. Acceptance companies purchasing conditional sales contracts are not in competition with national banks, there being a wide gap between the securities handled by such companies and the ordinary commercial paper accepted by banks.

7. Express companies being public utilities and assessable on an ad valorem basis the same as national banks will not be considered in competition with national banks in the absence of a showing that the capital in these companies is assessable on a lower rate.

8. Investments of individuals in bonds, mortgages and securities are not in competition with national banks in any consequential amount, within the business field of banks.

9. "There are no concerns or individuals within the state of Wisconsin engaged in *enterprises* in which the *capital employed* in carrying on its *business* is 'money' where the object of the business is the making of profit by its use as money except banks. All such persons, firms and corporations are required to organize as banks. In this respect the situation in Wisconsin, by reason of its banking laws, is radically different from those in most states, and so far as we are able to discover, not heretofore dealt with."

ARGUMENT.

PART I.

The claim is vigorously made in this case that the capital employed by the individuals and corporations engaged in the various lines of business set forth in the testimony is moneyed capital which comes in competition with the banking business and that, inasmuch as the State has exempted moneys and intangibles from ad valorem taxation, this works an in-

tentional discrimination against banks in violation of Section 5219. It is further claimed that the Wisconsin Supreme Court improperly took judicial notice of facts and matters. It is also claimed that personal investments of individuals in bonds, mortgages and interest bearing securities constitute *per se* competitive moneyed capital and that judicial notice of the quantity and character of such investments may be taken by the court supplementary to such facts in relation thereto as appears in the evidence.

These contentions require a discriminating discussion of the language and meaning of the decisions of this court in so far as it has discussed and decided, in the various cases, what constitutes "moneyed capital".

WHAT IS "MONEYED CAPITAL"?

Prior to the decision of this court in *Mercantile National Bank vs. City of New York*, 121 U. S. 138, the court was not called upon to make any discriminating decision as to just what was and what was not "moneyed capital". Its prior decisions *assumed* that money employed in various ways constituted moneyed capital. For instance, without citing cases, it was assumed that moneys due on judgments, accounts receivable, executory contracts for the sale of real estate and other similar transactions where interest was due, constituted moneyed capital. In the *Mercantile Bank Case* there arose the first occasion for the court to determine whether these words should be given their broadest literary meaning, or whether they should be limited by the context and construed in accordance with the purposes of the law. The nature and extent of that case need not be stated because it is fully quoted in the brief of plaintiff in error and in the briefs of companion cases submitted herewith. This case was followed by various other cases, hereinafter referred to, applying, illustrating and amplifying the rules of that decision.

In the cases of *First National Bank of Aberdeen vs. Chehalis*, 166 U. S. 440, and *National Bank of Commerce vs. Seattle*, 166 U. S. 463, the Mercantile Case was fully quoted and considered and applied. In those cases it was held for the first time that purely personal investments of individuals in interest-bearing securities such as bonds and mortgages did not constitute moneyed capital which were competitive with the business of national banks.

This was followed later by the *Merchants National Bank of Richmond vs. City of Richmond*, 256 U. S. 635, which case arose in a very peculiar way. Certain things in that case caused the national banks of the country to believe that the court had repudiated some of its former rulings or had limited the same and held, and intended to hold by its decision, that purely personal investments constituted competitive moneyed capital. As a result, a flood of litigation was started in the various states where, like Wisconsin, income tax laws had been adopted and moneys and intangibles exempted from ad valorem taxation because of the absolute and complete breakdown of that system of taxation. In other states the litigation arose under laws where the state, instead of giving up in desperation its efforts to enforce an ad valorem tax on moneys and intangibles, imposed a special and very low rate on such items on the theory that thereby it might coax out from under cover the maximum of taxable property of such character and thereby realize in the aggregate a greater quantum of tax than if such items were taxed at the same rate as banks and real property on an ad valorem basis. Typical cases of this character from Kentucky and Minnesota are now before the court to be heard at the time of the hearing of this case.

Since this case and the Kentucky and Minnesota Cases were decided, this court has decided the case of *First National Bank vs. Anderson*, 46 S. Ct. 135, in which it has explained the decision in the Richmond Case and limited and clarified its meaning; denied the contention that this case was

intended to overrule any rules or principles decided in the *Mercantile Bank Case* or the *Chehalis Case*, or any of the prior cases. It was directly decided in the *Anderson Case* that purely personal investments in the hands of individuals did not constitute moneyed capital in competition with national banks. In the present case, and in perhaps the companion cases submitted herewith, it will be necessary to decide, or at least to lay down rules whereby it may be determined when interest-bearing securities such as bonds held by individuals as investments are "purely personal" investments not in competition with the business of banks and when they are investments that are competitive with the business of banks.

In discussing these questions, in order to assist in applying rules laid down in these cases and the facts in these cases, we feel it is helpful to quote some of the literal language of this court.

"The key to the proper interpretation of the Act of Congress is its policy and purpose."

Mercantile National Bank vs. City of New York, 121 U. S. 138.

In the *Mercantile Bank Case* the court, after defining the business of banking as established by law and custom, said:

"These are the operations in which the capital invested in national banks is *employed* and it is the *nature of that employment* which constitutes it in the eye of this statute 'moneyed capital'. Corporations and individuals *carrying on these operations* do come into competition with the business of national banks, and *capital* in the hands of individuals *thus employed* is what is intended to be described by the Act of Congress."

In *First National Bank vs. Anderson*, 46 Sup. Ct., p. 138, it is said :

"The term 'other moneyed capital' in the restriction is not intended to include all moneyed capital not in-

vested in national bank shares, but only that which is *employed in such a way* as to bring it into substantial competition with the business of national banks."

Citing *Mercantile Bank Case* and *Aberdeen Bank vs. Chehalis*, *supra*.

The *Mercantile Bank Case* decided that the words "moneyed capital" do not mean all capital, the value of which is measured in terms of money, nor does it necessarily include all forms of investment in which the interest of the one is *expressed in money*; therefore, shares of stock in industrial and other companies, though expressed in money value, do not constitute moneyed capital.

"The purpose of the restriction is to render it impossible, in taxing the shares to create and foster an unequal and *unfriendly* competition with national banks by former shareholders in state banks or individuals interested in private banking or engaged in *operations* and investments NORMALLY COMMON to the business of banking."

First Nat. Bank vs. Anderson, *supra*.

"They" (the words 'moneyed capital') "include not only moneys invested in private banking properly so-called, but investments of individuals in securities that represent money at interest and other evidence of indebtedness such as NORMALLY enter into the business of banking."

Merchants National Bank of Richmond vs. City of Richmond, 256 U. S. 635.

"Obviously by this section, as interpreted by the decisions of this court, the limitation applies solely to a parallel with the individual or corporation whose *capital*

in money is used with a view of *compensation for the use of the money.*"

Talbot vs. Silverbow, 139 U. S. 438.

Palmer vs. McMahon, 133 U. S. 660.

Mercantile Bank Case, *supra*.

"It" (moneyed capital) "of course would exclude bonds, notes or other evidences of indebtedness when held *merely as personal investments* by individual citizens not engaged in the banking or investment *business*, for capital represented by this class of investments is not employed in substantial competition with the business of national banks."

First Nat. Bank vs. Anderson, *supra*.

"Its main purpose is to render it impossible for the state in levying such a tax to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a *business similar* to that of national banks or in engaging in *operations and investments* of a like character."

Des Moines Nat. Bank vs. Fairweather, 263 U. S. 102, page 116.

Mercantile Bank Case, *supra*.

In the *Mercantile Bank Case*, a slightly varying expression is used, to-wit:

"The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or *individuals carrying on a similar business and operations and investments of a like character.*"

"The *business* of banking, including all the *operations* which distinguish it, might be *carried* on under state

laws, either by corporations or *private persons*, and *capital* in the form of money might be *invested* and *employed* by individual citizens in many single and separate *operations* forming substantial parts of the *business* of banking."

Mercantile Case, *supra*.

"The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount or otherwise, which are, from *time to time*, according to the *rules of the business*, reduced again to money and *reinvested*. It includes money in the hands of individuals *employed in a similar way*, invested in loans or in securities for the payment of money, either as an investment of a permanent character, or temporarily, *with a view to sale or repayment and reinvestment*. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property."

Mercantile Bank Case, *supra*.

Chehalis Case, *supra*.

"Moneyed capital is brought into such competition where it is invested in shares of said banks or in private banking and also where it is employed, substantially as in the *loan and investment features of banking*, in making investment by way of loan, discount or otherwise, in notes, bonds or securities with a *view to sale or repayment and reinvestment*."

First Nat. Bank vs. Anderson, *supra*.

In *National Bank vs. Mayor of Baltimore*, 100 Fed. 24, on page 29, the Circuit Court of Appeals of the Fourth Circuit, in stating the rule of the *Mercantile Bank Case*, stated in the second paragraph above, interpolates the words "for the pur-

pose of making money by the operation" in the following statement of the rule:

"When such capital is invested in loans or securities of a permanent or temporary character, if it is so invested with a view of sale and reinvestment *for the purpose of making money by the operation*, it is moneyed capital."

The normal and literary meaning of the word "capital" by itself must be considered.

In 9 C. J., pages 1278-1279, in defining "capital" it is said:

"When used with reference to the property of individuals in any particular business the term * * * (capital) means the *property taken from other investments or uses*, and *set apart* for and invested in a *special business*, and in the increase, proceeds or earnings of which property, beyond the expenditures incurred in its use, consist the profits made in the business."

In *Clark vs. Bailey*, 21 Wallace 286, in defining "capital" it is said:

"It then means all property taken from other investments or uses, and *set apart* for, and invested in a *special business* and in the increase, proceeds or earnings of which property, beyond expenditures incurred in its use, consist the profits made in the business."

See also *First National Bank vs. Turner*, 154 Indiana 456; 57 N. E. 110.

Summarized:

1. The purpose of the statute is to prevent "unfriendly and unequal" competition.
2. The alleged competitive business must be such as is "normally common" to the banking business.

3. It must be invested and employed in some *operation* (business) forming a *substantial* part of the *business* of banking.

4. The money must be used as "capital" with a view of "compensation for the use of the money."

5. It does not include "purely personal" investments.

6. Inasmuch as the capital of a bank is *invested* in securities, which are *from time to time* according to the *rules of the business* reduced *again* to money and *reinvested*, in order to be competitive, and not be considered "purely personal", the moneys invested by individuals in bonds, mortgages and interest bearing securities must be "employed in a similar way" by investment in either permanent (long term) or temporary (short term) securities with a "VIEW to sale or repayment or reinvestment". To this should be added "for the purpose of making money by the *operation*".

With these rules in mind and in order to meet the contention of plaintiff in error that the *evidence in this case* shows the existence of substantial amounts of competitive moneyed capital which is exempt from taxation to the prejudicial injury of the bank, it becomes necessary to discuss in detail the particular propositions of law presented by the evidence.

THE BUSINESS OF (A) DEALERS IN BONDS, MORTGAGES AND SECURITIES; (B) ACCEPTANCE COMPANIES; (C) BUILDING AND LOAN ASSOCIATIONS ARE NOT "NORMALLY" COMMON TO BANKS, AND, THEREFORE, NOT COMPETITIVE.

A.

Dealers in Bonds, Mortgages and Securities.

The evidence shows that in the vicinity of Hartford there are various parties, persons and companies who *buy and sell*

mortgages. For the purpose of argument we will assume this is a state-wide condition. The proof also shows that in that vicinity and throughout the state there are bond houses, companies and firms like the First Wisconsin Company, Edgar, Ricker & Company, Morris Fox & Company and others who *buy and sell* industrial, government and municipal bonds and stocks and other securities. Undoubtedly, these dealers and companies employ money in their business. A local dealer in mortgages either uses his own or borrowed capital, buys the notes secured by mortgages (in Hartford mostly on western property) and sells them to his local customers. Bond houses and partnerships presumably use their own or borrowed capital and buy and sell bonds. *The manner of operation of these bond houses is not disclosed in the evidence.* We will assume, for argument, that it may be judicially noted that they join syndicates and buy complete bond issues from underwriting companies and resell their bonds to customers at a profit. Also that they will procure and buy for customers stock, bonds and securities for a commission. We contend that the business of these dealers and merchandisers is not competitive for several reasons:

1. They are not in competition because a national bank is not authorized by law to carry on the *business* of trafficking or *dealing* in mortgages or securities.

The express powers given to banks, so far as material to this action, are set forth in the seventh sub-paragraph of section 5136, volume 6 of the Federal Statutes Annotated, Second Edition, page 654, as follows:

“Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on

personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title."

In *First National Bank vs. National Exchange Bank*, 92 U. S. 122, at page 128, it is said:

"*Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in Fleckner vs. Bank U. S., 8 Wheat. 351, where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions. For this reason, among others, the acceptance of an indorsed note in payment of a debt due was decided not to be a 'dealing' in notes. Of course, all such transactions must be compromises in good faith, and not mere cloaks or devices to cover unauthorized practices.*"

In *People vs. Goldfogle*, 205 N. Y. S. 870, a case similar to this, it was contended that the New York bond houses were in competition with the business of banks. The court held otherwise and quoted from *Morse on Banks and Banking* (5th Ed., Vol. 1, Section 59), as follows:

"In this country the general rule is that any bank may loan on the security of stocks or bonds of other corporations but *cannot buy and sell them* * * *. It is no part of the banking business to engage in 'traffic' in merchandise or financial securities."

In the *Goldfogle Case* the court further says:

"It is not the business of a national bank, either by statute or in fact, to invest or *deal* in corporate bonds. They *invest* surplus funds in corporate bonds as a *mere incident* to the banking business exactly as they may rent offices in a bank building to others * * *."

The Goldfogle case was affirmed on appeal by the Supreme Court, Appellate Division, First Department, in 211 N. Y. S. page 85. A companion case, *People ex rel Peabody, Houghteling & Company vs. Goldfogle*, was also affirmed by the same court and division in 211 N. Y. S. page 114. In that case it was held that an investment company, buying and selling complete issues of corporate bonds secured by realty mortgages, having powers defined in the general corporation law, stock corporation law and banking law of New York, but not having power to receive deposits or issue its own debenture bonds or notes secured by deeds or deeds of trust, were not in competition with national banks. In that case the court approved the text of Pratt's Digest of National Banking Laws, at page 13 where the author says:

"A national bank has no power to deal in stocks and bonds, or buy and sell them upon commission. Such operations are not incidental to the business of banking as defined in the statute. * * * And the prohibition is implied from the failure to grant the power."

The court also quotes with approval the decision of this court in *California Bank vs. Kennedy*, 167 U. S. page 362 at page 366.

Both of these cases were affirmed without opinion by the Court of Appeals of New York on March 30, 1926, reported in 152 N. E. pages 418 and 419 on the authority of *People ex rel Pratt vs. Goldfogle*, 242 N. Y. 277. The opinion in the

latter case is too long to quote at large but should be examined by this court.

And in section 71 (c) of *Morse on Banks and Banking* supra, it is stated:

"A bank cannot traffic in merchandise, stocks, or securities."

And at section 77:

"It has been held not to be incidental to the banking business, nor an implied power pertaining to a bank, to buy or sell stock or bonds.

"A bank which lends money at interest on the security of bonds is not the rival of a dealer who purchases bonds *merely for the purpose of reselling them to investors.*"

See also Sec. 208 (a) Vol. 2, Part II, p. 662, *Morse on Banks and Banking*, 5th Ed.

In *National Bank vs. Mayor of Baltimore*, 100 Fed. 24 (C. C. A.), a national bank stock tax case, the court said, p. 30:

"It will be observed that the 'dealing in negotiable securities' is not one of the functions of a national bank prescribed by the law of its creation. That is commonly considered the business of a broker, but we are not required in this case to determine whether or not it is *proper* business of a national bank."

The following cases amply sustain the contention here made:

Corn Exchange Bank vs. Kaiser, 160 Wis. 199.

Weckler vs. Bank, 20 Amer. Rep. 95.

Bank vs. Pierson, 31 Amer. Rep. 341.

Fleckner vs. Bank, 8 Wheat. 337, 351.

First Nat'l. Bank vs. Nat'l Exch. Bank, 92 U. S. 122.

Concord Bank vs. Hawkins, 174 U. S. 364.

Talmadge vs. Pell, 7 N. Y. 328.

California Bank vs. Kennedy, 167 U. S. 362; 17 S. C. 831.

McBoyle vs. Nat'l. Bank, 122 Pac. 458.

First Nat'l. Bank vs. Converse, 200 U. S. 425; 26 S. C. 306, 311.

Hotchkiss vs. Bank, 106 N. E. 974.

Lexington vs. Bank, 75 Miss. 1.

National banks cannot deal in securities on commission nor act as agent or broker.

Farmers Bank vs. Smith, 77 Fed. 129.

Grand Forks Bank vs. Anderson, 172 U. S. 573; 19 S. C. 284.

Pollock vs. Lumbermans Bank, 168 Pac. 616.

See Federal Reserve Act, Sec. 19—Title "Insurance Agents."

Nor can they purchase for speculative purposes.

Metropolitan Trust Co. vs. McKinnon, 172 Fed. 846.

Hotchkiss vs. Bank, 106 N. E. 974.

Counsel may rely on a definition of the banking business given by the writer of the opinion in *Mercantile National Bank vs. City of New York*, 121 U. S. 138; 7 S. C. 826, on p. 835, as follows:

"The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and *dealing in negotiable securities issued by the government, state and*

national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute, 'moneyed capital' ”.

The court was there discussing the question as to whether money invested in the stock of railroad companies, mining companies, insurance companies and other business corporations, was employed in competition with banks. There was not there involved any question of “dealing” in mortgages, bonds or other negotiable securities, and it is quite apparent that the definition was quite *casually* given and without any thought to determine accurately the proper functions of a banking business.

This is further apparent in the following language used with reference to trust companies, found on page 837 of 7 Sup. Ct., to-wit :

“They receive money on deposit, it is true and *invest* it in loans, and *so deal*, therefore, *in money, and securities for money*, in such a way as properly to bring the shares of stock held by individuals therein within the definition of moneyed capital in the hands of individuals, as used in the act of congress.”

While the national banks may deal in government and municipal bonds, that power is conferred upon them because they are governmental agencies and the sale of government bonds is a governmental function and therefore *incidental* merely to the business of banking.

Junction City vs. Central National Bank, 96 Kansas
407; 153 Pac. 228.

The ownership by banks of government bonds is but an *incident* to the banking business.

First National Bank of Council Bluffs vs. Burke
(Iowa) 196 N. W. 287.

On page 56 of brief of counsel for plaintiff in error it is stated that according to the annual report of the Comptroller of Currency for the year 1924 approximately one-third of the investments of national banks consists of railroad, public service, corporation and other bonds and collateral trust and other corporation notes. They then say about the middle of the same page that the Comptroller of the Currency states that "a great number of national banks now *buy and sell* investment securities, and the office of the Comptroller has raised no objection because this has become a recognized service which a bank must render". It appears from Appendix F referred to in counsel's brief and set forth in full on page 84, not only that the banks have an immense amount of money invested in industrial and private corporation bonds but also that they have \$69,892,000 invested in "all other stocks" than in federal reserve banks. If this means that national banks are investing or dealing in corporate stocks, then within the repeated decisions by this court, such transactions are *ultra vires*. If it means that they have merely acquired these stocks through the process of foreclosing collateral or protecting other investments, then the item has no significance.

While we do not consider it now at all material whether a bank may *invest* in industrial bonds, it is material as to whether it may "buy and sell" such bonds as a business. If the Comptroller means that, notwithstanding the law, which the banks have so frequently violated, he has raised no objection because the doing of this business has become a "recognized service which a bank must render," then he certainly has become a party to *ultra vires* transactions on the

part of national banks and no help can be derived from his unfortunate admission in this respect.

Counsel say on the same page that the authority to invest in corporate bonds and notes is derived from section 5136 which gives authority to carry on as a part of the business of banking, among other things, "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt." If an industrial bond is equivalent to a note secured by a twenty year trust deed on real estate, and the bank could not loan to the borrower in the first instance on such promise and security, it is obvious on its face that this clause in the statute cannot be the source of authority for what is otherwise an illegal transaction.

On the same page counsel say that the opinion in *Newport National Bank vs. Board of Education*, 114 Ky. 87 is unanswerable on the subject of the express statutory power of national banks to invest their funds in corporate bonds. It is unfortunate counsel does not disclose to the court that the bonds therein were all public school bonds similar to government, state and municipals, and that the court in its argument assigned *special* reasons for the authority to banks which are not applicable to industrial bonds. It uses the language "corporate" bonds but it means *public* corporate bonds. These bonds are not secured by real estate as are industrial bonds.

2. The typical dealer in bonds, mortgages and securities is a mere *merchant*. The object of his business is not the making of profit by the use of *money as money*; it is not used with a view of *compensation for the use of money as money*.

He merchandises and traffics in this subject of trade the same as the man who buys and sells automobiles, clothing or other articles of personal property. His money is employed in his business not for the purpose of getting a return *for the use of money* but for the purpose of making a *profit* in buying and selling the article of merchandise. If

he buys or sells on commission, his compensation is in the nature of a service charge.

As the Wisconsin Supreme Court said in this case (R. 87):

"They are not in Wisconsin permitted to use the words 'bank' or 'savings bank', 'banker' or the plural thereof, upon any office sign or on any letterhead or other written or printed matter". Sec. 221.49, Wis. Statutes.

At the same place the court further says:

"National banks do not use their capital as a 'rotating' fund in the purchase and sale of securities."

3. Dealers in bonds, mortgages and securities do not operate in any wise like private or incorporated banks. They do not receive money on deposit and thereby operate on the capital of others. They operate either on their own or borrowed capital. They are not themselves money lenders in any sense of the word. As a matter of fact, they are proper aids and stimulants to the banking business. It may be assumed that they carry their money deposits in banks; that they are large borrowers from banks, and thus obtain their capital to carry on their business. Banks like the First Wisconsin National Bank, as it appears in this case, organize such investment companies like the First Wisconsin Company, referred to in the testimony, for the very purpose of carrying on business which a bank cannot properly handle, but which has a tendency to bring more business to the bank. How many of these investment companies auxiliary to banks there are in Wisconsin does not appear.

Within the rules elsewhere discussed in this case to the effect that a substantial, direct and competitive effect of the use of other moneyed capital must be clearly proven, it is certain that no such proof has been made in this case on this phase of the subject.

B.

Acceptance Companies.

By referring to the statement of facts page 8 of this brief, it will appear that the testimony in this case as to acceptance companies is woefully brief and meager. There is a mere general statement that their business is that of lending money and discounting commercial paper, and a *conclusion* that they compete directly with banks. It is further stated that they handle large sums. The number of these companies or the extent of their operations is not given. The way in which they conduct their business is not shown. Within the decisions of the courts elsewhere stated in this brief we might content ourselves with saying that this showing is entirely inadequate to establish any use of competitive moneyed capital in this respect. The operations of these companies are so recent that it may not be safe to assume any common knowledge. Subjecting ourselves to the charge of going out of the record, we will state that we are informed that these companies operate somewhat in the following manner:

Dealers in automobiles, motor trucks, motorcycles, vacuum cleaners, electric washing machines, pianos, talking machines and other similiar articles make sales on the installment plan taking notes or so-called "acceptances" under contracts in the nature of conditional sales contracts. Acceptance or securities companies purchase these notes, and sell and otherwise deal in them. For the purpose of obtaining capital for carrying on their business, they borrow heavily from the banks on their own notes, using the notes and contracts that they have acquired as collateral. In fact they occupy a twilight zone between pawnbrokers and the banks. They are not under regulation and many are going busted.

The nature of this kind of business was aptly described and

characterized in *People vs. Goldfogle*, 205 N. Y. S. 870, p. 881, wherein the court said:

"Bankers' Commercial Securities Co. Inc., purchases from dealers, who buy from manufacturers, conditional sale contracts, leases, and chattel mortgages on automatic piano player, calling for weekly or monthly installments over an average period of 30 months; the payments average about \$12.50 a month on each transaction. This is not the acquisition of evidences of indebtedness which 'normally enter into the business of banking'." Citing *Merchants' Nat. Bank vs. Richmond*, 256 U. S. 635, 41 S. C. 619.

Obviously the appearance of these companies in the commercial world is a demonstration that they are merely handling business that the banks cannot take care of. It may be assumed that the dealers in any community are bank depositors and borrowers. They finance themselves at their banks as much as they can. Banks are evidently loathe to become direct purchasers and owners of conditional sales installment contracts evidenced or secured by notes or acceptances. If it were otherwise, the banks would be handling them themselves. There is no claim in this case that the banks are handling this particular type of paper or security, although they are in the general business of discounting straight and ordinary commercial paper. This is either undesirable or overflow business which does not and cannot enter into competition with "normal" banking business.

As the Supreme Court of Wisconsin said in this case (R. 87):

"Their business more nearly corresponds with that of a pawnbroker or a chattel mortgage broker than that of a bank."

C.

Building and Loan Associations.

It must be conceded that the building and loan association in the city of Hartford, the same as other building and loan associations in the state of Wisconsin, is a heavy lender on real estate mortgages to its members. It does not follow, however, that these associations and money lenders are in competition with the banks. The building and loan associations have been classed with savings banks and trust companies, and they are sufficiently alike to receive similar treatment.

An illuminating opinion is that of Mr. Chief Justice Taft of this court, in a decision made by him, when he was circuit judge, in the case of *Mercantile National Bank of Cleveland vs. Hubbard*, 98 Fed. 465. In that case one question was as to whether or not the exemption from taxation of shares in building and loan associations was a discrimination against national banks. Judge Taft first referred to the decision of the Supreme Court in *Mercantile Bank vs. New York*, 121 U. S. 138, wherein it was held that *savings banks* do not come in competition with national banks. Thereupon he says:

"It seems to me that building associations are certainly not to be differentiated in their purpose or object, or practical effect, from savings banks, and that the capital invested in them, though subject to a somewhat different rule of taxation, *cannot be regarded as moneyed capital in competition with the moneyed capital in national banks*, any more than is capital invested in savings banks. The chief object of building associations is to encourage the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construc-

tion of the house. *The mere fact that every shareholder in a building association need not be a borrower cannot, I think, change the effect of the general purpose of the building association law.*"

This case was reversed on appeal (105 Fed. 809) but on an entirely different point.

In *Consolidated National Bank vs. Pima*, 48 Pac. 291, it was held that the failure to tax shares in a building and loan association was immaterial, since the limitations in Sec. 5219 applied solely to individuals, associations or corporations whose business was similar to or parallel with that of a national bank in making profit by the use of moneyed capital as money, and that the building and loan associations did not compete with national banks. The court reviews all of the decisions of the United States Supreme Court, and then says:

"Said building and loan association cannot be compared with the banking association. The exemption or rather the failure, to tax shares of the building and loan association does not make the tax in question illegal. *Mercantile Bank vs. New York*, 121 U. S. 138; 7 S. C. 826."

In *First National Bank vs. Dawson*, 213 Pac. 1097, the principal point involved was the alleged competition of building and loan associations. The state law imposed a tax on national bank shares on the basis of 40% valuation, and on shares in building and loan associations on the basis of 7% valuation, and it was claimed that because these associations were in competition this was a discrimination. The court reviews all of the earlier decisions of the Supreme Court of the United States at length, and quotes fully and approves Mr. Justice Taft's opinion in the Hubbard case in 98 Fed. 465. The court discusses fully the nature and functions of building and loan associations and the relation of

their business to ordinary banking business. We take the liberty of making the following quotation from the opinion in this case, to-wit :

"But it is argued that the Glendive association was in competition with the plaintiff, *because a part of the business of the plaintiff bank is making loans on real estate, and this is likewise the business of the association.* A national bank has but *limited authority* to loan money on real estate. That this is true is shown by an inspection of section 5137, U. S. Rev. Stat. (U. S. Comp. St. Sec. 9674), and 39 Stat. at Large 752; 1918 Supplement to Federal Statutes Annotated, 472 (U. S. Comp. St. Sec. 9763). *National banks are not permitted to make long time loans, and such loans as they make are secured by simple or straight mortgages, so-called, made as a rule to those who are strangers to the corporation.* Building and loan associations are permitted to make longtime loans to their own members, to those who stand in direct relationship to the associations' management; they are stockholders of the association. The chief object of building associations being to encourage the building of homes by poor people, it is a common practice, for one desiring to build, to borrow from an association a certain amount, subscribing for an amount of stock at least equal to the amount he borrows, also securing the loan by giving a mortgage upon the property to be improved. By paying interest upon his mortgage and so much a month upon his stock, the stock eventually becomes of sufficient value to equal the amount of the loan. Thus he pays for his home upon the amortization plan. The mortgage may be sold and transferred as other mortgages are. *Such mortgages often are purchased by banks and others who desire interest-bearing securities.*

"It seems that the plaintiff bank bought mortgages from the association, as the law permits it to do. And

the asociation assumed to buy mortgages from the bank which it did not have any right to do under the statute. A building and loan association is permitted to invest its moneys in the securities named in the statute and none other. So if the association attempted competition with the bank in buying and selling mortgage securities, it did what the law prohibits.

"It is clear, then, that the finding of the district court upon this issue cannot be sustained for two reasons: (1) Under the law the Glendive building and loan association was not and is not permitted to do business in competition with the plaintiff bank within the purview of section 5219; (2) the state of Montana, in levying taxes, may, if it sees fit, favor building and loan associations as a matter of public policy, and its action in so doing will not be deemed unfriendly discrimination against national banks."

In *People vs. Goldfogle*, 205 N. Y. S. 870; 881, affirmed by appellate division, 211 N. Y. S. pp. 85 and 114, it is said:

"The Bankers' Loan & Investment Company is a building and loan associaton. Its object is to 'encourage industry, frugality, home owning, and the saving of money by its members, the accumulating of savings and the loaning thereof to its members' as authorized by the New York Statute. It conducts the conventional business of a building and loan association. It approximates closely to a savings bank, of which Mr. Justice Matthews, in *Mercantile Bank vs. New York*, 121 U. S. 138, 161, 7 Sup. Ct. 826, 838 (30 L. Ed. 895), says:

'No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States. They are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty. To

promote their growth and progress is the obvious interest and manifest policy of the state.'

"The national bank certainly needs no protection against the activities of an association intended to aid small investors by thrift to accumulate from their savings sufficient money to build a home. *First Nat. Bank vs. Dawson County*, 66 Mont. 321, 213 Pac. 1097."

In *First National Bank vs. Chehalis*, 166 U. S. 440, 17 S. C. 629, p. 636, second column, the court reviewed the Mercantile National Bank case as to its decision in reference to savings banks, and said:

"As to savings banks, it was held that, though it could not be denied that their deposits constituted moneyed capital in the hands of individuals, yet it was clear that they were not within the meaning of the act of congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must also be exempted; that it was part of the policy of the state to encourage the accumulation of small savings belonging to the industrious and thrifty, and were within the reasonable exercise of the power of the state to exempt particular kinds of property; and the conclusion of the court in respect to savings banks was thus expressed:

"The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exceptions should be founded on just reason, and not operate as an unfriendly discrimination against investments in national bank shares. However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the share of deposits in savings banks as now organized, which the policy of the state exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they (the banks) are taxed at a rate not greater

than other moneyed capital in the hands of individual citizens otherwise subject to taxation.' ”

The same rule as to savings banks has been adopted by the Eighth Court of Appeals in *National Bank vs. Mayor*, 100 Fed. 24, p. 29.

In *Jenkins vs. Neff*, 186 U. S. 230, 22 S. C. 905, this court held that owing to the difference between the business of New York trust companies and the business of national banks a different method of treatment in taxation was justified because of the very limited competition between trust companies, as properly operated under the New York laws, and national banks. The court said :

“Trust companies are not organized primarily for banking purposes ; they are designed for other purposes, as pointed out in the *Mercantile Bank Case*, and it was never the purpose of the Federal government to interfere with the policy of the state in reference to the formation and development of such corporations as it should judge expedient, even though it should be found necessary to invest them with some of the powers of banking associations as an inducement to perform the other duties and obligations imposed by the state. As was said in the *Mercantile Bank Case* in reference to savings banks, ‘however large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the state exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation.’ ”

As pointed out in some of the cases discussing building and loan associations, they frequently do a great deal of business

with the banks and are feeders of business. It appears in this case that the building and loan association in question places its moneys in a depositary voted by the association. The First National Bank of Hartford does all the business of the association, and at one time it had \$14,000.00 on open checking account, not drawing interest (R. 55).

Within the rules of law laid down and the facts in this case, even any theoretical or technical competition between building and loan associations and national banks is so remote, indirect and unsubstantial that the exemption from taxation cannot be deemed a discrimination under or a violation of Sec. 5219.

THERE IS NO SUFFICIENT PROOF OF COMPETITION BY "DEALERS IN FOREIGN EXCHANGE".

As pointed out in the statement of facts in this case, p. 8, there are only fourteen lines of testimony by the witness Grove on this subject. He says he knows that there are individuals engaged in selling foreign exchange and that this business comes in direct competition with the banks. He does not name the individuals or show their method of carrying on their business nor the extent thereof. He then says that the American Express Company is engaged in selling foreign exchange and is thereby a competitor. Under this state of facts it is very clear that no sufficient evidence of any substantial amount of competition is made out so far as this business is done by individuals. The Supreme Court of Wisconsin, page 89, considers that this testimony merely shows testimony by express companies "which are under the laws of the state a public utility and therefore assessable on an ad valorem basis", and it not being made to appear that they are being assessed at a lower rate than the shares of national banks are assessed.

THERE IS NO EVIDENCE OF ANY BUSINESS DONE IN WISCONSIN BY INDIVIDUALS IN THE WAY OF LENDING MONEY ON "SHORT TERM PAPER".

The record in this case is entirely barren of proof of any business of this character done in Wisconsin other than by banks. Business of this character obviously would be the most typical kind of competitive business, and if there was any such business then a substantial amount could and would have been proven. Obviously, individuals cannot afford to carry on this business. Wisconsin banking laws do not permit them to do business under the name of a "bank". They cannot accept deposits, they must do business on their own capital. It is apparent on the face that no individual could open up an office which was in fact a banking office, pay rental, hire employees and assume all the overhead expense and do a profitable business merely on his own money when banks are doing business on deposits of customers amounting generally to a great deal more than the original capital invested in the business.

THERE ARE NO INDIVIDUALS IN WISCONSIN WHO ARE "INVESTING" IN SECURITIES AS A "BUSINESS"; ALL INVESTMENTS ARE "PERSONAL".

At the time this case was tried in the trial court and argued and determined in the Wisconsin Supreme Court, the decision of this court in the Richmond Case had raised a question as to whether "purely personal" investments constituted moneyed capital. The cases of *First National Bank of Aberdeen vs. Chehalis*, 166 U. S. 440, 17 S. C. 629, and *National Bank of Commerce vs. Seattle*, 166 U. S. 463, 17 S. C. 996, had a few years prior thereto clearly held that purely personal investments in interest-bearing loans, discounts and securities were not competitive with national banks. In this situation a very large and important part of the argument in

the Wisconsin court was addressed to this question. We confidently submit that the matter is now disposed of by this court by the case of *First National Bank of Guthrie vs. Anderson*, 46 S. Ct. 135. However, that case and all of the previous cases leave it an open question as to whether or not there might be certain individuals employing their funds as "capital" and making investments in long or short term securities with a view to continued investment and reinvestment. (See definition, page 24, this brief.)

We must confess that from experience or matters of common knowledge, we do not recognize this type of individual. The evidence in this case does not show, nor do we believe that in Wisconsin there exists, any individual or non-banking corporation who has set aside a fund as "capital", within the definition of this court hereinbefore cited, and is maintaining an establishment or a business with overhead expense, which business is carried on for the purpose of investing this individual's funds in long or short term securities with a "view" to sale and reinvestment "with the idea of making a profit on the operation". Assuming that this kind of a business is a *normal* function of the bank particularly with relation to *corporate bonds*, we say, as heretofore twice stated, no individual in Wisconsin can carry on such a *business* as this where the object of the business is "to make money by the use of money as such". He cannot possibly compete with the banks inasmuch as the bank has a vast amount of free money with which to do business. Every individual, whether he is a lawyer or whether he is a high wage earning mechanic like an employee of the Ford Company or the Nash Motor Company, who invests his surplus earnings in corporate bonds or stocks, does so, of course, with the idea of getting a return by way of dividends or interest for the use of his money, but certainly up to a certain stage his investment is a "purely personal" investment. If the bonds mature he receives his principal and accumulated interest, if the preferred stock is called he receives the prin-

capital and the premium, and these funds are again seeking investment, but we submit that this does not constitute him a person doing an "investment business". Also, owing to fluctuations in the securities market or the value of money, the value of his stocks or bonds may increase so much that he cannot afford to hold the same and it is for his best interest to sell and take a profit and then seek reinvestment. Certainly this kind of a transaction does not change him from a purely personal investor. If he sells for a *profit* on the sale of his security, that particular kind of a transaction is not normal to banks. Banks, as heretofore shown, are not entitled to deal in speculative stocks or bonds or to buy and sell "for a profit". We confidently submit that as to a purely personal investor, when his principal is paid in or even when he is obliged to sell and take the profit on his principal, the use of his funds for reinvestment does not constitute him a competitor with banks. What this court plainly had in mind was that the individual handling investments in order to be a competitor must be in a "business"; he must have set aside a "capital"; he must employ his capital as banks do.

The Wisconsin court properly took judicial notice that there were no individuals engaged in the investment "business", which business is competitive with national banks. However, even if an error has been made as to judicial notice, there is not a syllable of evidence in the case to show that the **INVESTMENTS OF INDIVIDUALS IN BONDS OR INTEREST-BEARING SECURITIES ARE OTHER THAN PURELY PERSONAL INVESTMENTS.**

On the other hand, we submit that the investments of national banks in long term corporate bonds are ultra vires. In 1917 the Comptroller of the Currency held that national banks could not invest in corporate bonds secured by real estate trust deed, and used the following language:

"These bonds are issued by an individual on the security of this real estate, and are therefore real estate loans, subject to the provisions of Section 24 of the

Federal Reserve Act and to the limit prescribed by Section 5200, Revised Statutes. If the owner's valuation of this property is correct, the bonds would come within the fifty per cent requirement, but if the company advertising them for sale is correct, the total issue of bonds exceed 50 per cent of the value of the property, and they would be unlawful investments for a national bank. It is also noted that the bonds are dated January 1, 1917, and that the first maturity date is January 1, 1919, the maturities of portions of the issue running up to 1923. At this time, therefore, *none of the bonds would be lawful investments, as they all run for more than one year and are secured by city property.* In cases of this kind, this office would advise the bank that the bonds are loans subject to Section 24 of the Federal Reserve Act, and also Section 5200 Revised Statutes, and as none of them conform to Section 24, relative to time for which they may run, *they would constitute illegal investments and should not be taken."*

See Federal Reserve Bulletin, Volume 3 (1917), p. 456.

For eighteen years Mr. Thomas B. Paton, the well known attorney of New York City, has been general counsel for the American Bankers' Association. In 1922 he published a volume of his opinions on banking questions covering a period of eighteen years. While this work is not a text book, yet it is prepared by an expert and is more like the text books of old times in that the book contains opinions and analyses of the author. In 1920, under paragraph 541, he rendered an opinion to the effect that long term bonds secured by real estate trust deeds were really the same as notes secured by ordinary mortgages of the same period, and that it was very doubtful as to whether a national bank could purchase as an investment such bonds of an industrial corporation.

See Sections 693 to 695 of Vol. 1 - Paton's Digest - Published in 1926

We agree that many banks are investing in corporate bonds, but we contend that they do so at their own risk, and the investments are ultra vires. Their violation of the law cannot change the illegal transactions into normal functions so as to bring other investors in the same kinds of securities in competition therewith.

As to the investments by individuals in ordinary real estate mortgages, our prior discussion practically covers this situation. Individual investments in real estate mortgages is not at all competitive and is so incidental and remote as not to constitute substantial competitive moneyed capital.

Investments in government and municipal securities. In *Mercantile National Bank vs. City of New York*, 7 S. C., on pages 838 and 839, it is held that investments in municipal securities are not in competition with the banking business. The court says:

"Such securities undoubtedly represent moneyed capital, but, as from their nature they are not ordinarily the subjects of taxation, they are not within the *reason* of the rule established by congress for the taxation of national bank shares."

To the same effect is the *National Bank of Baltimore vs. Mayor*, 100 Fed. 24, pp. 29 and 31.

We submit that the millions of dollars invested by individuals in corporate and other interest-bearing securities are not competitive with national banks, and there are no individuals, either shown by the evidence or in the field of judicial notice, in Wisconsin engaged in the "business" of investing in securities similar to the banking business.

THERE IS NO EVIDENCE, NOR CAN THE COURT JUDICIALLY NOTICE, THAT THERE IS IN WISCONSIN ANY SUBSTANTIAL AMOUNT OF BUSINESS CARRIED ON BY—

LENDERS ON REAL ESTATE MORTGAGES.

Counsel contend, in line with the argument of the writer of the dissenting opinion in the state court, that the testimony of Mr. Liver shows that in the vicinity of Hartford (and he claims similar conditions prevail throughout the state), there are various concerns in the so-called "loan" business who are lending money on real estate mortgages in competition with national banks.

There is no testimony by this witness that anyone is engaged in the "loan" business excepting as a *lender on real estate mortgages*; i. e., there is no lender in short term paper like banks.

On pages 3 to 5 of this brief we have analyzed in detail all of the testimony on this subject and clearly shown that there is no sufficient evidence to show that these men are engaged in such a business of *lending their own money*. The clear meaning and intent of the evidence is that they are either mortgage brokers buying and selling mortgages for a profit, or that they are merely lending agents lending money for their customers for a commission or a fee. However, even if it does not *clearly* appear what the business method of these so-called lending companies is, it certainly is true that the indefinite character of the evidence is insufficient to establish the employment of capital in a substantial amount, competitive in character, so that the failure to tax the same constitutes a discrimination against national banks. To strike down a state taxing system on the flimsy evidence of this kind would be the height of injustice. If national banks want to show that lenders on real estate mortgages are doing a substantial competitive business as the basis of an attack

on their taxes, the proof showing substantial injury should be clear and unequivocal.

Chief Justice Vinje in his dissenting opinion claims that the majority of the court should have taken judicial notice that these "loan" companies, as he calls them (meaning lenders on real estate mortgages), were doing a vast amount of business throughout the state, and that their business was competitive. We broadly and flatly challenge this statement in so far as it is a statement of fact. The majority opinion has determined that there is no substantial amount of competitive business of this character in the State of Wisconsin, which determination is based on the evidence introduced, matters judicially noticeable, and the inhibitory effect of Wisconsin's banking law which prohibits all private banking business. Not only do we say that such a fact is not true, and not therefore judicially noticeable, but we claim that *the carrying on of such a business is practically impossible in Wisconsin*. A bank does business in which from 75 to 90 per cent of its capital is free money procured by its deposits. By means of the use of this free money it can maintain an organization and pay its overhead expenses out of a straight and pure *lending business* where the nature and object of the business is the *use of money* and the receiving of *compensation for the use of money*. No individual or any so-called "loan company" can set up or establish a *business* to meet the competition of banks of this character. Banks can lend at the same prices as the individual or loan company. No loan company can make any money in maintaining an expensive establishment, paying its overhead and loaning its own capital in competition with the banks under these circumstances. Take for illustration the plaintiff bank: its capital and surplus is \$100,000 (R. 31 and 32); total deposits \$950,000; time deposits \$322,000; savings deposits \$249,000; open account deposits \$318,000 (R. 34). Assume that it must pay on the average 3% on its time and savings deposits. We may also assume that it can loan this money

out at 6%. Therefore, with a capital of only \$100,000 this bank has \$571,000 which it may loan at 3% profit and \$318,000 free money which it may loan at 6% profit. Obviously no loaning company doing a *pure lending business* on real estate mortgages could maintain an establishment or do any substantial amount of business in competition with the bank in this situation. Therefore, they *cannot* do it and they *do not* do it. What they do is the very kind of transaction disclosed in this case wherever the *nature* of the transaction is shown as in the case of Russell, Sayles and others. These so-called "loan companies" referred to in vague and ambiguous terms by Mr. Liver and by the learned Chief Justice are *mortgage brokers*. They buy either in Wisconsin or in Minnesota and Dakota real estate mortgages at one price and sell them to their customers at another. They buy and sell the same as the stock and bond men buy and sell stocks and bonds. *They use their capital as a rotating fund for getting a quick turnover.* Any particular mortgage belongs to them for but a brief time. They do not invest in the mortgage for an interest return which is "compensation for the use of the money". They buy it to get the same turnover that a speculator in wheat does when he buys and sells wheat. His business is not competitive with the bank because banks cannot buy and sell for a profit.

Not only is the evidence insufficient in the respects pointed out and from the nature of things is the business practically impossible, but there are also other failures of proof as to the competitive character of any such a business. Assume for the purposes of argument that there is a *prima facie* showing of the employment of a considerable amount of capital in business generally denominated as "loan" business and that this means the lending on mortgages, it does not follow that the business is competitive.

Prior to 1913 national banks had no authority to lend money on real estate. In that year the federal reserve act

was passed giving them limited authority. This was amended in 1916 and again in 1918, and the statute in existence in 1921 is now set forth in Federal Statutes Annotated, Supplement 1918, page 472, being Section 24 of said act, a copy of which is attached hereto as "Appendix A".

Under this act a bank can only make loans on real estate under the following conditions:

- 1st. The lands must be improved and unincumbered.
- 2nd. They must be situated within a federal reserve district, or within a radius of one hundred miles of the lending bank.
- 3rd. Loans on farm lands must not exceed five years.
- 4th. Loans on other real estate than farm lands must not exceed one year.
- 5th. Loans on either farm or other real estate must not exceed fifty per cent of the actual value of the property.
- 6th. The aggregate of the loans of any bank on either farm or other real estate, must not exceed twenty-five per cent of the capital and surplus, or one-third of the time deposits of the bank, whichever amount is the greater.

From these statutory provisions it appears that the field within which banks may loan their moneys on or invest their funds in real estate mortgages is very narrow, and that their operations must necessarily be somewhat incidental as compared with the general and ordinary business of the bank. In the instant case the plaintiff bank's president testified that the loaning on mortgages was not a very large part of its business (R. 26). As the plaintiff bank's time deposits are the larger, one-third of \$322,000 (R. 34) or \$107,000 is the limit of its loans on real estate mortgages. The peak of plaintiff's mortgage loans at different times during the year 1921 (excluding those which are not authorized by the fed-

eral reserve act), as set forth in plaintiff's brief on pages 18 and 19, were as follows:

February 1, 1921.....	\$33,325.00
April 28, 1921.....	20,875.00
June 30, 1921.....	20,125.00
September 6, 1921.....	19,975.00

It appears that during the year 1921 the plaintiff bank purchased from the Wisconsin Securities Company in Milwaukee and resold to their customers and clients between \$30,000 and \$40,000 of real estate mortgages (R. 56). We assume that such of these real estate mortgages that were on hand at the periods set forth in the above tabulation were some of them. Therefore it is apparent that a very large part of its real estate mortgage business was that in which it was acting as a *broker or merchandiser* and was not a normal function of the bank. Therefore, the record as to this particular claim is barren of proof that it was in fact doing any substantial amount of lending on real estate mortgages. It is probably true that this question cannot be determined upon the *inactivity of any particular bank in exercising functions which are authorized by law*, but we do think that the conduct of a particular bank may reflect the attitude and disposition of others engaged in the same kind of business and furnish proof as to whether or not this department of the business is *substantial and important*, or whether it is *merely incidental and unimportant*. When we consider that the safety of banks lies in their having their securities liquid and in the form of temporary or short term loans, it is obvious that this phase of the banking business is hardly normal and nothing more than incidental.

In this connection we call the court's attention to the last clause of Section 24 of the Federal reserve act (Appendix A). It is there provided that the Federal reserve board shall have the power from time to time to add to the list of cities in which national banks shall not be permitted to make loans

secured upon real estate. It will be noted that in the first sentence of Section 24 the power given to national banks excepts banks in any "central reserve city" and the clause above referred to gives the board power to add to the list *other cities in which banks cannot deal in real estate. This provision indicates that the authority is somewhat temporary in character.* The disastrous experience of many western banks in the last few years in getting their securities all tied up in long term real estate mortgages (particularly state banks), illustrates the danger of any very large portion of the banking business being devoted to securities of this character.

We also submit that the moneys put by national banks into real estate mortgages is more in the nature of an *investment of its surplus* than it is the use of a part of its funds in a regular loaning business. The situation is comparable to the investing of its money in long term corporate bonds secured by trust deeds. The nature of this transaction is quite well described by the court in *People vs. Goldfogle*, 205 N. Y. S. 870, affirmed by Appellate Division 211 N. Y. S. 85 and 114, to-wit:

"It is not the *business* of a national bank, either by statute or in fact, to invest or deal in corporate bonds. They invest *surplus funds* in corporate bonds as a *mere incident* to the banking business, exactly as they may rent offices in a banking building to others. An individual who invests in corporate securities no more competes with the 'business' of a national bank than does the landlord of an adjoining office building."

It is a matter of common knowledge that banks do not care for real estate mortgage loans. Most such loans made by non-bankers are such as the banks cannot take either because the period of maturity is too long, the security is insufficient, lands are not improved or they are already encumbered by first mortgages. There is no proof in this case that in Hartford or elsewhere in Wisconsin any national bank has ever

been unable to get all the loans on real estate mortgages that it wanted. As a matter of fact, such loans as are taken by individuals or made by dealers in mortgages constitute the great field of investment which the bank either cannot take or does not want. Any competition is remote and incidental.

Most borrowers on real estate are farmers or those who are making building improvements on real property in the cities. Money loaned is frequently borrowed by the lender from the banks and then through the borrower the same immediately gets back into the stream of the money leading to the bank. Wisconsin made a heroic effort to tax mortgage loans but was obliged to repeal this law. The result of the law was that the lender was to provide in his note and mortgage that the borrower was to pay the tax. This shifted the burden on the borrower and resulted in the virtual exemption of the lender from the tax. Therefore, Wisconsin might well have been justified in exempting from any ad valorem tax every lender *who lends his own money on real estate mortgages*, whether it be a "loan company" such as Judge Vinje refers to or any other individual lending money on mortgages as a business and other than purely by way of personal investment. Partial exemptions of mortgages have been sustained by this court in *Hepburn vs. School Directors*, 23 Wallace 480. With reference to such an exemption it is said on page 485:

"It was evidently intended to prevent a double burden by the taxation, both of property and debts secured upon it."

The failure of Wisconsin to impose an ad valorem tax upon lenders upon real estate mortgages, either personal investors or those who do a "loan company" business, cannot be attributed to any intent to discriminate against banks. As heretofore noted, prior to 1913 national banks could not lend on real estate security. Wisconsin passed her law exempting moneys and intangibles from ad valorem taxation (inclusive

of loans on real estate mortgages), in 1909, at which time *national banks were not competitors with real estate mortgage lenders.*

The situation is similar to that in *First National Bank vs. Chapman*, 173 U. S. 205, where it was said:

“At the outset it was plain that the system of taxation adopted in Ohio was not intended to be unfriendly to, or to discriminate against the owners of shares in national banks; for, as observed by the State Supreme Court, that system was adopted *long prior* to the passage of the law by congress providing for the incorporation of national banks.”

We submit that there is no proof, nor can it be judicially noticed, nor is it in accordance with the facts, that there is in Wisconsin to any substantial extent or degree whatever any amount of moneyed capital that is employed in the *business* of lending on mortgages in competition with the banks.

HOW OTHER MONEYED CAPITAL COMPETES

In the trial court Grove and Liver developed a theory as set forth on pp. 9 to 10 of this brief that the mere *withdrawal* of moneys by depositors from the bank for investment in even stocks and non-competitive securities constituted “competition”; that competition for capital and competition for money, regardless of the respective uses of the money, was within the meaning of the statute because it prevented the bank from having a chance to use such money for its deposits or having a chance to obtain such money on the sale of its stock. The Wisconsin supreme court effectually demolished this argument (R. 85 and 86). Because a depositor withdraws his money to engage in the pawn shop business and refuses to buy national bank stock, does not make this use of his capital competitive unless the business of a pawn shop is competitive with the banking business. Carried to its con-

clusion, a depositor or even a non-depositor who keeps his money in a stocking who yields to the wiles of an industrial stock salesman competes with the bank merely because he refuses to keep or put his money on deposit and refuses to invest it in bank stock, and instead invests it in industrial corporate stock, which investment is concededly non-competitive. The conclusion is clear that no capital in the hands of individuals is competitive so as to constitute "other moneyed capital" unless it is substantially used in the same manner and for the same purposes as is the capital of national banks.

UNDER WISCONSIN BANKING LAWS THERE CAN BE NO SUBSTANTIAL COMPETITION IN THE ESSENTIAL AND NORMAL PARTS OF THE BANKING BUSINESS.

The Wisconsin situation with reference to the banking business, and its historical relation to the Wisconsin tax systems, is so completely and satisfactorily set forth and discussed in the majority opinion of the Wisconsin Supreme Court (R. 74 to 76), that we feel it would merely encumber this brief to attempt to restate the argument or to add thereto, and therefore we respectfully refer the court to the Wisconsin court's opinion.

Counsel for plaintiff in error claim there may be banks of *discount* in Wisconsin notwithstanding the Supreme Court decides (R. 76) as follows:

"In the state of Wisconsin there is no person, firm or corporation receiving deposits, issuing bills or with power to issue bills, or engaged in the *business of discount* as carried on by banks except those organized under the banking laws of the state of Wisconsin or of the United States."

If this language means that under the Wisconsin law individuals *cannot* do the business of a *bank of discount*, then

this court is bound by the construction of the local statute. If the Wisconsin court knows judicially *as a fact that there are no banks of discount*, this court certainly cannot take judicial knowledge to the contrary, and even if the Wisconsin court erred in taking judicial knowledge of this fact, still the record is entirely barren of proof of any individual or individuals carrying on the business of a bank of discount.

In the *MacLaren Case*, 141 Wis. 577, referred to in the court's opinion, it was established that in Wisconsin there could be no ^{private} banks of issue or circulation nor of deposit. That case also decided that if any individual or private corporation was doing *any one* of the functions of a banking business he was violating the Wisconsin banking law. This proposition was based upon the decision of the New York Supreme Court in *Curtis vs. Leavitt*, 15 N. Y. 9, on page 56, wherein it was said:

"If a person should open and keep an office for receiving deposits payable on demand, he would carry on a well known branch of banking business, although he might use the deposits in speculation or other modes totally unconnected with banking. He would be a banker. So if he were to keep an office for issuing his own circulating notes, or for dealing in *exchange*, or for *discounting bills*, and *should actually carry on either of those operations without the others*, he would exercise a banking power, although confined to a single one."

The court's statement that there are no private individuals doing the business of a *bank of discount* certainly should be judicially noticeable under the economic situation. As we have shown elsewhere in this brief, no individual or corporation prohibited by law from the using of the word "bank" could take \$50,000 of capital and \$50,000 in surplus, own or rent the necessary building, pay all of the necessary overhead expenses of an organization and do a mere business of dis-

counting commercial paper or lending on short term paper in opposition to banks in competition with a bank of the same capital and surplus. The Hartford bank with its capital and surplus, its \$318,000 of free money of depositors and \$571,000 of time and savings deposits (presumably costing 3%) or a total of \$889,000, which it can put out to earn normally from five to six per cent, demonstrates that no individual or private corporation can possibly do a banking business under this situation where it cannot receive deposits.

We contend also that the banking statute set forth on page 14 of this brief clearly prohibits any individual or purely private corporation from doing any substantial part of the normal business of a bank, whether it be the functions of a bank of deposit, discount or any feature thereof. Section 224.03 makes it unlawful for any such person or corporation, unchartered as a national bank or under the state law, "to do a banking business". This is a general prohibition and applies to all of the substantial features of banking which would include the doing of a discount business or the lending on short term paper by opening up any place of business and doing the business as banks do. While Section 224.02 specifically provides that the soliciting, receiving or accepting of deposits as a regular business by a person or private corporation "shall be deemed to be doing a banking business", it is perfectly obvious that this section is not exclusive in its definition of the banking business nor is it intended by Section 224.03 that the limitation thereof shall be confined merely to such features of banking as are set forth in Section 224.02. The provisions of Section 224.02 are cumulative and intended merely as a more detailed statement and definition of certain features of the banking business in order to make it clear and certain that such features come within the general definition of the banking business.

We submit that the Wisconsin court's decision to the effect that private banking *in all of its features* is effectually prohibited in Wisconsin and that there are no individuals en-

gaged in any such features of banking "where the object of the business is the making of profit by its use as money", is amply justified and, therefore, there is not and cannot be any substantial and material competition with state or national banks in Wisconsin.

Outside and beyond its analysis of this general situation, the Wisconsin court took the precaution to analyze the specific items of proof in this case as to building and loan associations, acceptance companies, personal investments of individuals in bonds, mortgages and securities, etc., and properly came to the conclusion under an abundance of legal precedence and authorities cited, that such classes of business were not competitive in character and therefore were not to be considered.

On pages 60 to 66 of brief of counsel for plaintiff in error a strenuous effort is made to support the conclusion that because of certain statutory provisions there might or might not be in existence moneyed capital employed in competitive business and therefore the conclusion must follow that there is such business and that the Wisconsin court erred in taking judicial knowledge to the contrary. The fact that Wisconsin adopted Section 70.31 in 1923 so as to comply with the broadened provisions of the enabling act of congress in 1923 is unimportant. It seems childish to argue that because reference is made in this provision to the existence of competitive moneyed capital it must follow as a matter of law or the court must take judicial notice that a substantial amount of such moneyed capital exists. It is said that because Wisconsin has a statute authorizing land mortgage associations the Wisconsin court erred in declaring as a matter of common knowledge that no competitive moneyed capital exists in the state. It is true there is such a statute but there is no evidence in this case of the existence of any such association (witness Liver's statement that plaintiff bank deals in bonds of organizations like the *Wisconsin Farm Loan Association*, referred to on page 48 of brief of counsel

for plaintiff in error, does not constitute evidence of existence of *land mortgage associations*), nor is there any evidence whatever establishing their activities or the competitive features of their business. The same is true as to the statutes as to so-called loan and guaranty companies. The activities of these companies invite the investigation of facts; their competitive nature as a matter of law or the doing of any business thereunder do not appear on the face of the statute. The giving of the Railroad Commission of Wisconsin power to regulate the bond issues of corporations, and the reports of the commission showing millions of dollars of such corporate bond issues is hardly to be seriously considered. If such corporate bonds are sold, as we assume they are in 99 cases out of 100, purely for personal investment, then the fact referred to is entirely without significance. The making of such arguments as this clog the record and are not helpful to the court.

THE WISCONSIN COURT DID NOT ERR IN TAKING JUDICIAL NOTICE OF ANY MATTERS OR FACTS IN THIS CASE.

Examination of the Wisconsin court's opinion discloses that the situation is treated from two standpoints. First, the *evidence* received in the case; second, the situation as it existed under the Wisconsin tax and banking laws and the economic and legal result which the court could judicially notice follows therefrom.

The court found that under the prohibitory banking laws of Wisconsin there were in *fact* no persons or private individuals maintaining establishments or places of business who were carrying on the business of a bank of deposit, or the business of a bank of issue or circulation, nor any other features of banking, "where the object of the business is the making of profit by its use as money". We submit the Wisconsin court's conclusions are amply justified by the law and

by the record and that this court should recognize the Wisconsin court's decision as to what facts may be judicially noticed. Counsel argue that if the Wisconsin court judicially takes notice of certain facts and this court concludes that it has arrived at the wrong conclusion, it may take judicial notice to the contrary. We do not so understand the law.

In *Wear vs. Brewster*, 245 U. S. 154, the state court took judicial notice that the Kansas River was navigable as a matter of fact at Topeka. On appeal to this court it was argued that this was a question of fact that should have been submitted to the jury and that the state court was not entitled to take judicial notice thereof. This court said:

"If a state court takes upon itself to know without evidence whether the principal river of the state is navigable at the capital of the state we certainly cannot pronounce it error. In this respect it is a question of state law." (Citations.)

In *First National Bank of Garnett vs. Ayers*, 160 U. S. 660, the state court took judicial notice that the credits from which debts might be deducted did not constitute a large or even material part of the moneyed capital of the state. This court held that it could not take judicial notice to the contrary because there was no proof whatever upon the subject. This is a clear holding that where a state court takes judicial notice of the existence of any, or the quantity of, competitive moneyed capital, this court cannot and will not hold its finding in that respect to be error, or take judicial notice to the contrary, unless there is evidence in the record compelling a contrary conclusion.

In *New York ex rel Amoskeag Savings Bank vs. Purdy*, 231 U. S. 373, the New York state court held that "when all things are considered the rate even with the privilege of deducting debts, is not greater than that applied to other moneyed capital in the hands of individual citizens of the state". It was contended in this court that this finding was based

upon no facts of experience or investigation and amounts to a pure surmise. This court said:

"We do not think it to be so lightly treated; but if it were, it still remains to be said that it was incumbent upon the plaintiff in error to show affirmatively that the New York taxation system discriminates in fact against the holders of shares of national banks before calling upon the courts to overthrow it; and no such showing has been made."

Counsel makes a very interesting and remarkable argument to the effect that where four out of seven judges contend one way and three the other, the fact involved *cannot possibly be subject to judicial notice*. Mr. Voliva of Zion City still contends that the earth is flat. If he were the minority one of three judges his persistence in this contention would prevent the majority of the court in taking judicial notice to the contrary. We assume that if a court has power to determine a fact or a principle of law the fact that a minority may differ does not deprive the majority of its power. In Wisconsin the rule has been for many years that the question of negligence, even from undisputed facts, may be an issue of fact for the jury under these circumstances: Could reasonable men disagree as to the inference to be drawn from such undisputed facts? If they could disagree the issue was for the jury, if not, it was for the court. A most ingenious lawyer presented this argument ^{in the supreme court} in the supreme Court:—Twelve jurors agreed in favor of negligence; one trial judge disagreed and set the verdict aside; on appeal to the supreme court four judges agreed with the circuit judge and three with the jury; conclusion: as all were presumed to be reasonable men, it followed as a matter of law that a majority of the supreme court could not hold that reasonable men could not disagree as to the inference to be drawn. Of course the argument failed.

The supreme court has not committed any error in relation to judicial notice.

THE WISCONSIN STATUTE IS NOT VOID ON ITS FACE BECAUSE OF EXEMPTION OF INTANGIBLES FROM TAXATION. TO AVOID TAX PROOF MUST BE MADE OF EXISTENCE OF OTHER COMPETITIVE MONEYED CAPITAL IN SUBSTANTIAL AMOUNTS.

This proposition is discussed in the brief of counsel for the bank on pp. 23 to 36. The proposition amounts to this: Assuming that in 1921 there was not *in fact* a dollar of capital in Wisconsin substantially competitive with national banks; that by reason thereof there was *in fact* no discrimination against national banks by the exemption of intangibles; that there was no hostile intent against national banks by exemption of intangibles; *nevertheless*, they say the court should declare the Wisconsin bank tax statute, and also the tax, void merely because *another statute* exempted intangibles from taxation.

Counsel argues the case as if the Wisconsin bank tax statute (Appendix C—Brief of Plff. in Error, p. 79) said on its face, "The capital stock of national banks shall be taxed on an ad valorem basis at the same rate as other property; 'other moneyed capital' shall be exempt from taxation."

The Wisconsin bank tax statute does not so provide. In and of itself alone it is a mere exercise of a power to tax bank stock on an ad valorem basis pursuant to the enabling act of congress, Section 5219. It in itself contains no provision as to how other moneyed capital or how intangibles or any other species of property shall be taxed. As we have heretofore shown in a companion section in the same chapter relating to "assessments", there was for years a section providing for the taxation of moneys, credits and intangibles, which section was, however, repealed in 1909 when the Wisconsin income tax law was adopted. This exemption statute does not exempt "other moneyed capital"; it merely exempts moneys, credits and intangibles. So much of the moneys, credits or intangibles as are *not* "moneyed capital" are, of

course, not affected by the exemption. Therefore as *some part* of the exempted species of property may or may not be "moneyed capital", the *facts* must be shown in any particular case in order to determine the effect of the exemption statute.

This distinction should be borne in mind in considering the Ayers and the Chapman cases hereinafter discussed. Unless it is *impossible* for a situation to exist where there shall be no substantial amount of competitive moneyed capital, this argument does not appeal to one. No national bank can be hurt if its only real competitors are state banks taxed like itself simply because there may be a statute which exempts "moneys, credits and intangibles" when the holders of the same are not real or substantial competitors. If the bank is not hurt either in fact or in law, then it is not discriminated against. As this court said in the Mercantile Case:

"The key to the proper interpretation of the act of congress is its policy and purpose."

The policy and purpose of the act is to protect national banks against prejudicial discrimination through the exercise of state taxing powers.

We submit that there is a complete answer to counsel's argument as follows:

It is elementary that no person or corporation has a standing in court to set aside a state law as unconstitutional unless it can show that it is injured thereby. A general citation of authorities is unnecessary. If in the given case there be neither proof nor presumption that any part of a mass of moneys, credits or intangibles in Wisconsin are substantially competitive with banks, then the plaintiff bank has not shown a *status* sufficient to entitle it to attack this law as unconstitutional. In *Supervisors vs. Stanley*, 105 U. S. 305, a state statute did not give to bank stockholders the same right to deduct debts as to the owners and holders of credits and other intangibles and it was claimed that by reason thereof the entire statute was void. It was held that unless

the bank stockholder could show that he had in fact some debts to offset, he was not injured and could not complain. The following from the court's opinion is pertinent:

"What is there to render it void as to a shareholder in a national bank, who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What legal interest has he in a question which only affects others? *Why should he invoke the protection of the act of congress in a case where he has no rights to protect?* Is a court to sit and decide abstract questions of law in which the parties before it show no interest, and which, if decided either way, affect no rights of theirs?"

In *Austin vs. The Aldermen*, 7 Wallace 694, the following is the syllabus and well states the rule involved:

"If a State statute (taxing national banks), passed in professed exercise of an authority given by Congress to the States to pass such a statute, does not deprive, contrary to the act of Congress, *the party to the suit*, of any right, nor work, as to him, any effect which the act of Congress forbids, this court cannot, on the case being brought here by such party on the ground that the State statute violated the act of Congress, declare the State statute void."

The situation in the Austin case was as follows:

Section 5219 requires, as a condition of the exercise of tax authority by the states, that the tax must be levied at the site of the banking association and not elsewhere. Massachusetts, either inadvertently or in defiance of this statute, passed an act taxing the shareholders of banks *in the respec-*

tive cities and towns where such shareholders resided. Austin, the complaining stockholder, lived in Boston, which was the location of his bank. He objected to the tax because the state law *on its face* violated the federal act as to the *situs* of taxation. The court very properly answered that inasmuch as he resided in the same city as the bank and his bank was taxed at the residence of the bank, he was therefore not hurt by any invalid portion of the statute and would not be heard to complain.

The same principle is applied by this court in *Citizens National Bank vs. Kentucky*, 217 U. S. 443. There it was held that only non-resident stockholders in a national bank could complain of the supposed invalidity, as to them, of the retroactive feature of the Kentucky act of March 21, 1900, making it the duty of certain officers of the bank to list its shares of stock for taxation, and requiring the bank to pay the tax and a penalty for delinquency. The court applies the rule of the *Austin* and *Stanley* cases above cited.

These authorities amply justify the conclusion that if the plaintiff bank, or any bank maintaining suit in Wisconsin, could not prove that there was a substantial amount of competitive capital among the moneys and intangibles exempted by a separate statute, it would have no standing in court to make complaint or to claim that the statute is void on its face.

Counsel seem to rely upon a more or less inapplicable statement made by the Supreme Court of Wisconsin in its opinion. In the court's opinion (R. 76), the court justifies its disregarding the general findings of the trial judge and states as one ground "the further reason that the law under consideration is one of state-wide application." The court then says:

"The court is required to take judicial notice of *general conditions* to which the law applies. It is either valid or void in total. Its validity can be made to depend upon a particular finding of fact relating to the conditions in a single locality so that, assuming it to be ad-

ministered as written, the law might be valid in one place, void in another, or valid at one time and void at another."

Of course if this rule, in its fullest sense, was applied under all circumstances it would run counter to the rule of this court in the Austin and Stanley cases. The occasion for the latter part of the court's statement was the thought that it was being contended in the state court that the plaintiff had to prove that there was competition in the "particular" locality of the "particular" plaintiff bank, and if it failed in such proof and statute, and therefore the tax, was valid in that locality. The court misapprehended the contention, which was one first orally made on the argument. The contention was not that the statute would be *valid* in a particular locality and invalid in others, but that in the *particular case the particular plaintiff* would not have shown that he was injured. Of course, and it was not contended otherwise, if the plaintiff had assumed and undertaken the burden of proving a *state-wide condition of affairs* and to have shown the general conditions applicable, of which the court says that it may take judicial notice, then it might well be that the plaintiff might recover on the ground that the entire statute was void, although this seems somewhat inconsistent with the decisions of this court. Nevertheless, we insist that this statute is not void *on its face* unless there is ascertained to be, either by proof, inference or judicial notice, a substantial amount of competitive capital among the class of property exempted from taxation by the statute objected to.

We proceed to examine the cases relied upon by counsel and we confidently claim they have no bearing whatever upon the proposition. At the outset we desire to object to the language loosely employed by counsel in discussing this subject and in their discussion elsewhere in the brief. On page 23 they say that it became "a purpose of the state to exempt all 'moneyed capital' in general". Again, on the same page:

"We now find a general purpose to exempt all *moneyed capital* from taxation on that basis". The Wisconsin exemption statute does not exempt *moneyed capital*; it exempts moneys, credits and intangibles. It is begging the question to say that these are either necessarily or in fact moneyed capital. They may all be, or a part may be, or no part may be moneyed capital.

After general observations counsel enumerate a certain class of cases which they claim sustains the proposition contended for. That is to say, cases which hold that a statute or a tax will be set aside *without proof either as to amount or as to competitive character of moneyed capital*.

The case of *Lionberger vs. Rouse*, 9 Wallace 468 has no bearing. In that case the court held that the federal congress did not contemplate that the state should do the impossible. At the time of the enactment of the federal act there were two banks in the state which under contract with the state could only be taxed in a limited amount. This court held that the recognition of the validity of such contract and the limited taxation of these two particular banks, was not a violation of the federal enabling act. Citation of a case in this manner is but a waste of the court's and counsel's time.

The case of *People vs. Weaver*, 100 U. S. 539 must be construed in the light of the later cases and the comments of the court on the Weaver case. The case involved the question of the validity and effect of a statute which permitted the holders of personal property and credits to deduct their debts without giving the same privilege to the holders of national bank stock. The assessing authorities assessed Weaver \$38,250 on account of his ownership of the bank stock. He made an affidavit that after deducting all of his debts from the value of his personal estate, the balance would not exceed one dollar. *The deduction* was denied in the state courts. The questions raised in the cases hereinafter dis-

cussed were evidently not raised in this case and the court says that the statute of New York is in conflict with the act of congress and reversed the judgment for further proceedings. A particular explanation of this holding will be set forth in connection with the Amoskeag case hereinafter discussed.

In *Supervisors vs. Stanley*, 105 U. S. 305, the question came up again from the state of New York. A large number of shareholders who had paid a bank tax made an assignment of their claims to him. Unfortunately the plaintiff did not prove that his assignors, or any particular ones of them, or at least all of them, had any deductible debts or that they were injured in anywise by the statute. Held that the statute itself was not, however, rendered void by reason of the conflict and if the stockholder had no debts to deduct then the assessment is valid and he cannot recover the tax; if he has debts the assessment is only voidable and the tax will be computed according to the proper deductions.

The court discusses quite fully the case of *Austin vs. The Aldermen*, 7 Wallace 694, hereinbefore cited, and states that the argument as there made is pertinent here. The court says with reference to the Austin case:

"The court evidently went upon the principle that the statute was only void as against the act of congress in cases where someone was injured by the particular matter in which there was such conflict. The case seems to us directly in point."

The *Weaver* case is referred to as not holding to the contrary. (See page 315.)

Counsel on page 29 of their brief say that this case was decided on the theory that the law denying the right of offset was void on its face and that by the same reason if the law entirely exempted other moneyed capital, it would be held void on its face. This is so obviously a misconstruction of

the case, especially in the light of the later cases, that no further comment is necessary.

Hills vs. Exchange Bank, 105 U. S. 319 and *Evansville Bank vs. Britton*, 105 U. S. 322 were companion cases decided at the same time as the Stanley case and adopt the rule thereof and go no further.

In the *Britton case* the bank still insisted on the idea that the act itself was void but this court held that it decided otherwise in the Stanley case and adhered thereto. On page 30 of counsel's brief they say that the effect of the decision is to hold, so far as the limitation on the right of offset was concerned, that the statute was void on its face and that there was no necessity of proof. Comment on this conclusion is unnecessary.

Whitbeck vs. Mercantile Bank, 127 U. S. 193. This case merely follows the Hills case and has no different force or effect. The only distinguishing point raised was as to whether or not the objecting stockholder had lost his rights by failing to make *demand for deduction* at the proper time. We cannot understand counsel's persistent claim as to what this and other decisions hold. Counsel is equally wrong in holding that the Chapman case placed any such construction upon the Whitbeck case.

We now refer to *First National Bank of Garnett vs. Ayers*, 160 U. S. 660 (which is *not* cited in plaintiff's brief) in order to give the historical line-up of these decisions and to understand their meaning.

In this case the complaining stockholders made proof that they had debts to deduct. It, however, appeared that in Kansas among the mass of credits which might constitute moneyed capital there was only a limited class which were subject to deduction for debts. This appears to be the first case subsequent to the case of *Mercantile Bank vs. New York*, 121 U. S. 138, in which the principle therein laid down was applied to this class of cases. After discussing that case this court held that inasmuch as it did not appear in the record,

and inasmuch as this court could not take judicial notice, that the amount of moneyed capital from which debts might be deducted, as compared with moneyed capital invested in the shares of banks, was so large and substantial as to amount to an illegal discrimination against banks, the court could not declare the tax against the bank stockholders unlawful. On the question of judicial notice this court held that it could not take judicial notice of the facts in respect thereto and referred to the fact that the state court had determined of its own knowledge that such other credits from which debts might be deducted did not constitute a large or material part of the moneyed capital of the state, and in fact noticed that the credits from which deductions could not be made constituted the great bulk of the moneyed capital in the state. This court would not, however, override the decision of the state court on these points. It is indicated that if the question of what facts might be judicially noticed is a matter of doubt or uncertainty or dispute, that proof must be taken whereby the facts constituting discrimination might be clearly disclosed. The court says:

"The single fact that the statute of Kansas *permits* some debts to be deducted from *some moneyed capital*, but not from that which is invested in the shares of national banks, is not sufficient to show such violation."

So we say the *mere fact* that there is a statute which exempts moneys, credits and intangibles, (especially where it affirmatively appears by proof in the case that a large and substantial part of such moneys, credits and intangibles is not and cannot be "moneyed capital"), under the decisions of this court, does not make either the statute or the tax invalid, but there must be proof that the quantum of real moneyed capital exempted by the statute is sufficient to be relatively important and to constitute a substantial discrimination.

The case of *First National Bank vs. Chapman*, 173 U. S. 205 is almost identical in facts and in rulings with the Ayers case and there is no ground for distinction. The court says:

"It is thus seen that there are large and unknown amounts of what are in the act termed 'credits' which are not moneyed capital, and that the total amount of credits which are moneyed capital, within the definition given by this court to that term, is also unknown. That portion of credits which is not moneyed capital, as so defined, does not enter into the question, because the comparison must be made with other moneyed capital in the hands of individual citizens. We are thus wholly prevented from ascertaining what proportion the moneyed capital of individual citizens included in the term 'credits' (and from which some classes of debts can be deducted) bears to the amount invested in national bank shares. We are therefore unable to say whether there has or has not been any material discrimination such as the federal statute was enacted to prevent. We cannot see upon these facts any substantial difference between this case and those of *Bank vs. Ayers*, 160 U. S. 660, 16 Sup. Ct. 412, *First Nat. Bank of Aberdeen vs. Chehalis Co.*, 166 U. S. 440, 17 Sup. Ct. 629, and *National Bank of Commerce vs. City of Seattle*, 166 U. S. 463, 17 Sup. Ct. 996."

Counsel's observation on page 30 of their brief as to what the Chapman case shows with reference to the meaning of the Whitbeck case is not accurate. In the first place, this court says the Whitbeck case went off *principally* on the question of discrimination by wrongful administration of the law in the matter of valuation and equalization. The court then emphasized that "the point to which the court chiefly directed its attention related to the question whether a timely demand had been made for such deduction of indebtedness".

Therefore the court holds that the Whitbeck case is not an authority against the decision in the instant case.

Counsel's analysis of *Amoskeag Savings Bank vs. Purdy* 231 U. S. 373, is not convincing. After having made the premise earlier in the brief that the Weaver case established the principle they contend for, they attempt on pp. 31 to 32 to distinguish the later Amoskeag case by pointing out that while in the Weaver case two classes of property were valued and rated by the same method, a different method was employed in the later case. They concede that in the later case the court properly held that an issue of fact might be presented as to whether discrimination actually results from the operation of the law. They entirely overlook the fact that in the Chapman and Ayers cases, much later than the Weaver case and after the Mercantile National Bank case, the court held in cases typical of the Weaver case that the question of actual discrimination in these kinds of cases might and did present an issue of fact.

In the Amoskeag case, on the question of what was judicially noticed by the court below and what the plaintiff must prove, this court said:

"Plaintiff in error contends that the statement of the New York court that 'when all things are considered, the rate, even without the privilege of deducting debts, is not greater than that applied to other moneyed capital in the hands of individual citizens of the state,' is based upon no facts of experience or investigation, and amounts to a pure surmise. We do not think it is to be so lightly treated; but, if it were, it still remains to be said that it was incumbent upon plaintiff in error to show affirmatively that the New York taxation system discriminates in fact against the holders of shares in the national banks, before calling upon the courts to overthrow it; and no showing has been made."

Inasmuch as counsel apparently make no claim from the holdings in *Covington vs. First National Bank*, 198 U. S. 100 and *Citizens National Bank vs. Kentucky*, 217 U. S. 443, no comment is need.

In *Eddy vs. First National Bank of Fargo*, 275 Fed. 550 it is true that the court indicated that in case of partial exemptions from taxation the question of whether there was substantial discrimination might be a subject matter of inquiry. However, the case went off on the proposition that the *actual proof* showed that in the city of Fargo the moneyed capital of individuals amounted to about \$2,000,000 and the moneyed capital of banks to about \$1,383,023 and that about the same relative proportion existed throughout the county and the state. The court in an aside said that these facts might be said to be in accord with common knowledge. That case, however, loses all of its significance when it appears that it is based upon the supposed rule announced by this court in the Richmond case. At the time of the decision in the Eddy case it was contended by many and evidently thought by Judge Hook, that the Richmond case held that all *mere private and personal investments* in the hands of individuals constituted "other moneyed capital." We are informed that the record in the Eddy case made no discrimination between investments and credits of this character and other credits or investments which might be truly competitive. Therefore this case loses its significance in the light of the decision of this court in the case of *First National Bank of Guthrie vs. Anderson*.

Counsel next makes the proposition (brief page 32) that cases dealing with partial exemption have no weight in opposition to the cases cited by them. Inasmuch as we have shown that the cases cited by them do not support their contention, it does not seem material to discuss the cases of partial exemption. We contend, however, that the principle involved in the cases of partial exemption affords a substantial analysis. The principal thought in those cases is that whatever

the state legislature does will not be deemed a violation of Section 5219 unless it works a substantial injury to someone. The authorities cited in the first part of the argument on this subject sustain the proposition that a stockholder of a national bank cannot complain against a state statute unless he can show some injury and these cases are in line with the principle of the partial exemption cases.

Therefore, we confidently contend that inasmuch as it is not *proven* in this case, nor is it judicially noticed, that there is any substantial amount of competitive moneyed capital in Wisconsin, the mere existence of an exemption statute exempting all credits and intangibles (regardless of their character as "moneyed capital") does not in itself make void on its face the Wisconsin statute taxing the shares of national banks.

PART II.

HISTORICALLY AND ECONOMICALLY CONSIDERED, THE "WISCONSIN SYSTEM" CONSISTING OF THE PROHIBITION OF ALL PRIVATE BANKING, THE TAXATION OF ALL INCOMES AND THE EXEMPTION OF MONEYS, CREDITS AND INTANGIBLES FROM AD VALOREM TAXATION, NEITHER INJURES, NOR DISCRIMINATES AGAINST, NATIONAL BANKS.

We believe that the operation of the fundamental principles of economics in the field of taxation under consideration should not be ignored by this court.

The taxation of money and intangible property as contended for by counsel for plaintiff in error was never possible of actual realization in any state in the union. It would be impossible today for any state to devise administrative machinery adequate to enforce taxation of money and intangible property as counsel for plaintiff in error contended.

must be taxed as a condition precedent to imposing an ad valorem tax upon shares of stock of national banks under 5219, United States Statutes. This class of property is not being taxed, as counsel contend it should be taxed in order to meet the requirements of Section 5219, in a single state retaining the general property tax. This is not due to maladministration of law. It is due to the fact that it is inherently impossible to enforce an ad valorem tax upon money and intangible property not engaged in the business of organized and regulated banking.

Much has been said in this case about common knowledge. We venture to assert that nothing is more completely a matter of common knowledge than the inability of governments to subject money and intangible property to taxation by means of a general property tax. We approve the statement made in the Minnesota Case, submitted herewith, by the Attorney General in his brief in the State Court, to-wit: "Such an inherent human inability is a greater bar than any mere legal obstacle or any constitutional prohibition".

Like every other state in the Union, Wisconsin from statehood down to 1911, maintained the general property tax with unimportant exemptions. The general property tax demanded the taxation of all wealth, and all evidence of wealth, at the same rate or, as many people expressed the underlying idea upon which this scheme of taxation was based, "all property must be taxed on the same basis and at the same rate." The apparent equality and justice of this proposition appealed to those who failed to recognize the fact that this plan of taxation was inherently defective and entirely impossible of enforcement. For years most people appeared to be blind to the failure of all efforts to successfully administer this system of taxation. In the early days of the Republic when practically all wealth consisted of real estate and certain tangible property easy to discover and easy to appraise the general property tax provided a satisfactory

system of taxation. Sec. 5219, U. S. Statutes, as amended in 1868, remained in force without amendment until 1923. In 1868 it was not evident to statesmen and legislators that the general property tax so far as it applied to money and credits was doomed to complete failure. However, this fact became apparent a few years later.

An era of industrial development and commercial expansion without precedent or parallel was inaugurated in the seventies. This period was marked by social, industrial and financial changes entirely beyond the comprehension of legislators of an earlier day. A vast system of credits was developed. Holdings in stocks, bonds, debentures, notes and securities too numerous to mention or describe, attained enormous proportions. Money on deposit in national, state and private banks reached staggering totals. Money and all forms of intangible property multiplied with great rapidity. All of this money, and all of these investments, were universally declared to be taxable and efforts were made in every state to tax them. Drastic legislation was enacted by state legislatures. Severe penalties were decreed all for the purpose of placing this property on the assessor's books for taxation. Different states resorted to different methods. Various forms of inquisition and espionage were set up. Tax ferrets were employed. Special penalties for perjury were provided. The result in every state was absolute failure. Many of these efforts to enforce the general property tax by legislation were continued long after it was clearly evident that this tax was fundamentally wrong in theory and impossible of enforcement. As we shall later show the failure to enforce the general property tax against moneys and credits was not due to inefficient enforcement. It was directly due to inherent defects in the system itself. The general property tax was successful as applied to real estate and improvements thereon and to certain simple taxable personal property such as farm animals, farm machinery, wagons, carriages, trucks, etc. However, it was a total failure insofar

as it attempted to subject moneys and credits or intangibles to taxation. Prior to the enactment of the Wisconsin Income Tax Law it was literally true in every state that the tax laws subjecting money and credits to taxation were held in utter contempt. This fact was recognized by the Wisconsin Tax Commission in its report for the year 1903. On page 119 of this report we find the following:

"Laws which are fundamentally wrong are incapable of substantial enforcement among free and enlightened peoples, and the fact that the assessment laws under discussion have never been effectively enforced is evidence that there is some radical defect in the principle upon which such laws are founded. It would not be wholly correct to assert that in their practical rejection of such laws the people and their assessors have shown themselves wiser than their law makers; but, is it not true that by instinct or intuition they have arrived at correct conclusions which have not as yet been consciously perceived by the majority of legislators."

Charles J. Bullock, Professor of Economics and a tax authority, described the situation in an address on the taxation of intangible property delivered before the Second National Tax Conference at Toronto, Canada, October 6, 1908. He said:

"It is notorious that personal property largely evades taxation, and there is statistical evidence that this evasion is progressive particularly in the case of intangible wealth."

Prior to 1911 there was complete unanimity of opinion on this subject on the part of students of economics, finance and taxation. All accepted authorities were in accord. They all held that moneys and credits were not being taxed and that they could not be taxed by any system of direct taxation. It would serve no useful purpose to encumber this brief with

quotations from Seligman, Adams, Wells, and other nationally known authorities whose names will be readily recalled by members of the court. The following quotation from Professor Ely, appearing on page 78 of the Proceedings of the Third International Conference on State and Local Taxation, is typical:

"The one uniform tax on all property in direct taxation never has worked well in any modern community or State in the civilized world, though it has been tried thousands of times, and although all the mental resources of able men have been employed to make it work well. I have read diligently the literature of finance to find an example, but in vain; and lest this should not be sufficiently trustworthy, I have made it my business, in my capacity as tax commissioner, to visit typical states and cities and to make inquiries in person of citizens as well as of officials trusted with the administration of the laws. I have visited Charleston, S. C.; Savannah, Atlanta and Augusta, Ga.; Columbus, Ohio; Madison, Wis., and Montreal and Quebec, Canada. And the result has been abundantly to confirm all that I have said about the impracticability of the one uniform tax upon real and personal property."

The Third International Tax Conference at Louisville, Kentucky, Sept. 21-23, 1909, passed the following resolutions:

"WHEREAS, the working of the general property tax depends upon the efficiency and thoroughness of its administration, which in most states is confined to officials locally elected or appointed, and

WHEREAS, the general property tax as thus administered is severely criticised by students of the subject as unjust and unequal between taxpayers in the same district.

RESOLVED, that a committee of three members be appointed by the Executive Committee of the International Tax Association to investigate whether the failure of the general property tax is due to inherent defects in the system itself or to weakness in its administration, and to report to the next annual conference its conclusions upon the subject, including in the investigation if deemed necessary the further question of substituting an income tax in whole or in part for the personal property tax."

This resulted in the adoption of the following resolution by the Fourth International Tax Conference held at Milwaukee, August 30, to September 2, 1910:

"WHEREAS, a committee was appointed under a resolution adopted at the Louisville Conference to inquire into the causes of the failure of the general property tax,

RESOLVED, that the Conference endorses the conclusions of the said committee and finds that the general property tax under the higher rates of taxation caused by the increase of public expenditures in the United States has broken down so far as it applies to personal property, and

RESOLVED, That the Conference finds that the taxation of personal property has not been more successful under strict administration than under lax; that states which have modified or abandoned the general property tax show no intention of returning to it; and that states where the general property tax is required by constitutional provisions there is a growing demand for the repeal of such provisions, and

That the failure of the general property tax, in its application to personal property, is due to inherent defects in its theory; that even reasonably fair and effective

administration is unattainable and that attempts to strengthen such administration simply accentuates the inequalities and unjust operation of the system."

This conference was attended by authorities and experts on taxation from thirty-five states, two provinces of Canada and sixteen leading American universities.

A study of the reports of the Wisconsin Tax Commission from 1901 to 1909 clearly indicates that those in responsible charge of taxation in the state of Wisconsin were conscious of the fact that money, credits and intangibles of all kinds were not bearing even a small part of their just share of the burden of taxation; that this class of property did not bear any appreciable part of the burden. As early as 1901 the Wisconsin Tax Commission said:

"The time is perhaps not far distant when a better understanding of these questions will be had and when there will be a more distinct demand than now exists that much intangible property so called which under existing practice is virtually exempt, shall be made expressly exempt from direct taxation. * * * It may be remarked in this connection that a transition from virtual exemption under existing practice to substantially the same exemption by legislative act, would involve no disturbance in industrial or commercial conditions."

In 1903 the Wisconsin Tax Commission made an exhaustive report on the entire subject. This was brought about in part as the result of an effort to tax mortgages in the state of Wisconsin inaugurated in 1902. Without reviewing this effort, or subsequent legislation on the subject, suffice it to say that the effort resulted in failure. In its summary

of conclusions contained in the 1903 report, the Wisconsin Tax Commission said, page 139:

"It is scarcely necessary to make a formal statement of our final conclusions. It seems very clear that the only just and rational solution of the problem as to taxation of credits is to cease all attempt to tax them—in other words, to exempt them from taxation. This would not be an exemption in any true sense, for there is really nothing to exempt. Credits are property for purposes of taxation, by legal fiction only. The proposition therefore is not the exemption of the property, but to abolish the fiction."

In its report for 1909, page 13, the Commission says:

"As to moneys and credits most assessors seem to have abandoned all efforts to assess them. This is true as a rule throughout the state."

In 1916 Robert Murray Haig, Ph. D., Columbia University, published a history of the general property tax in Illinois. According to a law then in force in that state all persons not included in the legal definition of "bank", "bankers", "brokers" were required by law to list whatever money they possessed under this item. This was practically a tax upon bank deposits in the hands of private individuals. Therefore it was possible to test it by comparing assessed values with bank deposits. The following figures show how the law operated in Cook County, including the city of Chicago:

	Assessed Value	
	Bank Deposits	of Money
1910	\$521,099,660	\$1,719,365
1911	555,610,648	3,733,947
1912	622,324,029	2,173,277

Credits were also separately assessed and for the year 1912 in Cook County, including Chicago, the total assessed value

of all credits exclusive of moneys was only \$1,257,024. Data and statistics of this striking and illuminating character could be cited without limit.

Knowledge of this state of affairs was not confined to students of taxation. Courts were conscious of the failure of all efforts to tax moneys and credits. In *National Bank vs. Mayor, et al.*, 100 Fed. p. 24 at page 27 :

"The taxation of personal property has always and everywhere been a vexatious problem. Horses and cattle, wagons and carriages, the implements of husbandry and household furniture—all things, in fact, which are visible, and cannot readily be concealed, including therein shares in incorporated companies, which may be compelled by the law creating them to make returns—are within comparatively easy reach of the tax assessors. But the great mass of personal property, in which the wealth of a country is invested, consisting of bonds and other evidences of credits, which can be readily hidden, escape the eye of the assessor, and nothing is more conclusively settled by human experience than that it is impossible to collect taxes upon this kind of property with any reasonable approach to accuracy or equality, and this is not for want of long-sustained and earnest effort to accomplish it. There is a monotonous uniformity in the reports of the failures of every system attempted, however stringent may be the legislation, or however arbitrary or despotic may be the powers with which the assessors may be clothed. The heavy hand of the tax-gatherer always falls upon the widow and the orphan, upon trustees and guardians, whose estates are required by law to be revealed to the courts of probate and upon those only whose consciences are unusually scrupulous, and who, having least experience in business, are least able to bear the burden, while the most inadequate returns are invariably made by the rich, who are usually most ingenious in evasion, and most

fertile in expedients to escape taxation. The result is that always and everywhere no appreciable part of such intangible property is reached by laws, however ingeniously framed or severely enforced."

Chief Justice Winslow in the opinion of the Court in the Income Tax Cases, 148 Wis. 456, at page 505, said:

"By the present law it is quite clear that personal property taxation for all practical purposes becomes a thing of the past. The specific exemptions of all money and credits and the great bulk of stocks and bonds, as well as of all farm machinery, tools, wearing apparel, and household furniture in actual use, regardless of value, goes far to eliminate taxation of personal property; * * * That taxation of such property has proven a practical failure will be admitted by all who have given any attention to the subject. Doubtless this was one of the main arguments in the legislative mind for the passage of the present act."

The legislative history of Chapter 358, Laws of 1911 (Wisconsin Income Tax Law), fully confirms the foregoing statement by Chief Justice Winslow.

This legislation was authorized by an amendment to Section 1, Article VIII of the State constitution of Wisconsin which became effective in 1908. A Legislative Committee appointed in 1909 was authorized to investigate and report on the entire subject in 1909, under Resolution No. 8 Laws of 1909, p. 806.

This Committee did its work thoroughly. After careful study and consideration and after holding hearings in various parts of the state, it submitted its report to the Governor and in turn the Governor submitted the report to the legislature. The report was printed in full in the Assembly Journal of Feb. 9, 1911. The following excerpt from the report is germane to this discussion:

"The joint committee appointed by the legislature of 1909, in pursuance of joint resolution No. 8, to 'investigate the subject of an income tax and to report a bill or bills covering that subject', have the honor to report.

Failure of Personal Property Tax.

The members of the committee at the very outset fully realized the difficulty of the task before them. They also realized the pressing necessity for relief from the present personal property tax, and its inefficient administration. The large popular majority in favor of the income tax amendment to the constitution is akin to a mandate from the people that an income tax be added to our tax system.

The committee gave hearings in several of the leading cities of the state, and collected such materials as it could conveniently reach for its own information.

It seems to be practically agreed by students of taxation that the personal property tax as we have it is a failure, not only because of inefficient administration, but because of inherent defects in the theory upon which it is founded. In theory the income tax meets with universal approval, the real problem being in its application and administration."

The entire matter was referred to a Special Joint Committee of the 1911 Legislature. After holding many hearings this committee on April 28, 1911, reported a bill which was finally enacted without many material modifications. This committee submitted its arguments in support of the various sections of the bill in the shape of "Notes" to each section. The following excerpt from the notes found on page 1, of the committee's report, are of interest:

"A few reasons why we should begin to employ income as a measure of the taxpayers' ability to contribute to the support of the state are the following:

1. Statesmen and students agree that in so far as it applies to personal property (in the words of Professor Seligman) 'the general property tax as actually administered today is beyond all peradventure the worst tax known in the civilized world.'

2. The modern industrial movement has not only greatly increased stocks, bonds, credits and all forms of intangible personal property which so easily escapes taxation, but it has given rise to a constantly increasing class of citizens who receive their livelihood, not from property at all, but from salaries and professional sources and cannot be made to pay their just share of taxes by the general property tax.

3. To employ income as the basis of taxation will enable the State to reach all classes of its subjects and require each to pay in proportion to his ability."

The bill reported by this Committee was finally adopted and subsection 10, Section 70.11, Wisconsin Statutes 1925, exempting

"All moneys or debts due or to become due to any person and all stocks and bonds, including bonds issued by any county, town, city, village, school district or other political subdivision of this state, not otherwise specially provided for."

was adopted as an amendment to Section 1036, Wisconsin Statutes 1909.

This law exempted the income of state banks, national banks, mutual savings banks, trust companies, mutual loan corporations or associations organized under Chapter 185, Laws of 1911, from payment of an income tax. All other persons, firms and corporations were required to pay such tax at a graduated rate from a minimum of 1% to a maximum of 6%, the maximum rate for corporations applied to all taxable income over \$6,000.00 and the maximum rate for

individuals applied to all taxable income over \$12,000.00. The shares of all such banking associations were taxable as personal property as provided in Section 70.37, Laws of 1921, which section specifically provided that:

"In the assessment of shares of stock in any bank the assessor shall first determine the total true cash value of all such shares according to his best judgment. If the building in which such bank maintains its offices and transacts its business be owned by such bank, the assessed value thereof, including the land upon which it is located, if owned by such bank, not exceeding the amount for which such building and land are carried as an asset upon the books of the bank, shall be deducted from the total value of such shares. The remainder of such total value or the whole thereof, if the bank does not own such building, divided by the total number of such shares, shall be taken as the valuation for assessment of each of such shares. No deduction shall be made on account of any other real estate in the assessment of the shares of stock of any bank."

It will be noted that this provision of the Wisconsin Statutes provided for the deduction of the book value of all real estate owned and used by banks in carrying on their business. Exhibit 4 (Transcript of Record, page 66) shows that the book value of plaintiff's banking house in 1921 was \$21,000.00 and that its capital stock was \$50,000.00. Prior to 1903 Wisconsin had followed the practice of assessing the real estate separately and also assessing the capital stock of banks at its true cash value. Chapter 72 Laws of 1903 changed this practice. This fact is referred to merely as evidence of the fairness exhibited by the state of Wisconsin toward national banks in developing its system of taxation. Of course, some national banks and some state banks transact business in leased buildings and upon leased land, but such instances are very rare. The report of the Com-

missioner of Banking for 1921 shows that the value of real estate owned by national banks in Wisconsin was in excess of one-third of the capital stock of such banks for that year. The figures are as follows:

1921	
Banking House	\$ 9,448,000
Furniture and Fixt.	1,096,000
<hr/>	
Totals	\$10,544,000
Capital stock paid in.....	\$24,285,000
Surplus	12,766,000
Undivided Profits	7,074,000
<hr/>	
	\$34,125,000

Therefore, Wisconsin scrupulously observed the requirements of Section 5219 so far as they are applied to the taxation of real estate owned by national banks.

In order to understand the effect of the enactment of Wisconsin's Income Tax Law in 1911 and the exemption of moneys and credits complained of, it is necessary to study the banking laws and regulations of the State of Wisconsin in force at this time. The Wisconsin statutes relating to banking then in force and the construction placed upon them by the Supreme Court of the State of Wisconsin is summarized in the opinion of its Supreme Court by Mr. Justice Rosenberry in the case at bar. (Transcript of Record, page 68.)

We contend that under the banking laws of the State of Wisconsin, the enactment of the Income Tax Law of 1911 and the statutory exemption of moneys and credits from ad valorem taxation which was nothing more or less than a legislative recognition of the fact did not, so far as national banks in Wisconsin were concerned, frustrate the purpose of Section 5219 or tend to impair the efficiency of national banks to perform and discharge the functions for which they were established. On the contrary, this legislation was in fact

beneficial to both state and national banks. It was accepted by the banks without question until after the decision of this court in *Merchants National Bank vs. Richmond*, 256 U. S. 635. Then, for the first time, the taxation of national banks under this system of legislation was challenged and attacked.

Let us now examine the results of the legislation complained of. As above stated, moneys and credits of all kinds, including stocks and bonds, and certain tangible personal property were exempted by the law of 1911. We are only concerned with moneys and credits. The legislation must be tested by results. Compliance with the requirements of Section 5219 U. S. Statutes must be determined by the facts of the situation and not by a mere study of statutory phrasing. If this substituted system of taxation resulted in lightening the burden of taxation borne by national bank stock, then the state was justified in continuing to tax bank stock, state and national, as it had been theretofore taxed. The Wisconsin Tax Commission in its report for 1912, page 20, says:

"The net yield of the income tax is therefore considerably more than twice the amount of tax raised on the property which by virtue of the terms of the law is exempted."

In 1914 the Wisconsin Tax Commission in its report for that year, pages 91-92-94, made an exhaustive study of the effect of the income tax law, for the purpose of determining whether or not the substitute produced as much revenue as would have been produced under the discarded plan of assessing moneys and credits and other property exempted. The following excerpt from this study gives the conclusions of the Tax Commission:

"When the income tax was introduced there was exempted from taxation moneys and credits, stocks and bonds not otherwise specially provided for, personal ornaments and jewelry habitually worn, household furniture, machinery, implements and tools used on farm,

orchard and garden, and a watch carried by the owner, in addition the limitation on \$200 on musical instruments, and household furniture, the limitation of \$50 on tools and of \$50 on each watch carried by the owner, were removed. * * * Two questions arise. Was the exemption wise? Did the income tax fill the gap left by these exemptions? * * * The assessment of stocks, bonds, money and credits was particularly inequitable. A careful investigation of 473 estates some years ago showed taxable securities worth \$2,266,105 which were assessed at only \$74,995, or less than 3½% of their true value. The tangible personal property of these estates—household furniture, pianos, carriages and the like was inventoried at \$148,309 and assessed at \$80,390, or 54% of its true value. The securities, therefore, were worth fifteen times as much as the tangible personalty, but were actually assessed for a smaller amount.

“And the assessment of securities was unbelievably irregular. * * * (The Commission then took up an analysis of assessment of moneys and credits for 1910.) The year 1910 is taken merely because we have exact population statistics for that year. The figures in any other year would be practically the same. In Douglas County \$100 worth of moneys and credits were assessed—less than 1c per capita. In Iron, Vilas, Florence, Oneida, Sawyer and Taylor Counties no moneys and credits were assessed at all. In Kenosha County on the other hand the assessment amounted to \$71.68 per capita; side by side in the neighboring County of Walworth the assessment was only \$23.48, while in the adjoining County of Rock it sank to \$5.99; but jumped again to \$34.58 in the adjoining County of Green. In La Crosse County the assessment reached \$42.63 per head, while in no county bordering on La Crosse did it reach \$8.00 per head. In Outagamie County with the

prosperous City of Appleton the per capita assessment was \$1.15, whereas in the adjoining County of Winnebago it was \$15.26.

"Within any particular county the assessment of moneys and credits was just as irregular. Take Kenosha County, for example, where the assessment for this class of property was high in 1910. In Kenosha City the per capita average rose to \$105.95, while in Pleasant Prairie, town in the same county, it was only 6c per capita. But even in this county the large assessment is explained principally by the assessment of a few large estates in the probate court—the property largely of widows and orphans which because it was a matter of public record could not be concealed. * * The preceding facts make it reasonably clear that the personal property taxes in question were not worth keeping, whether a substitute could be secured or not. The income tax, however, more than filled the gap left by their abolition. Up to June 30, 1913, the cash collections under the income tax assessed in 1912 amounted to \$1,631,413.38. On the other hand, the careful estimates of what the personal property tax exempted would have yielded at the tax rates prevailing in 1912 were made and the amount so lost or relinquished was found to be \$703,589."

Therefore, we contend that the plan of taxation adopted in 1911 did actually result in lightening the burden of taxation borne by national banks. This being so we contend that there is no cause for complaint; that the spirit of Section 5219 U. S. Statutes was observed; that there was no unfriendly or hostile legislation enacted by the State of Wisconsin against the interests of stockholders of national banks.

The Wisconsin legislation complained of conforms to the declaration of this court with reference to 5219 U. S. Statutes, in *Davenport Bank vs. Davenport*, 123 U. S. 83, at page 85, which is as follows:

"It has never been held by this court that the States should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners. All that has ever been held to be necessary is, that the system of state taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks. Nor does the act of Congress require anything more than this; neither its language nor its purpose can be construed to go any farther. Within these limits, the manner of assessing and collecting all taxes by the States is uncontrolled by the act of Congress."

Under the Wisconsin laws all capital actually competing with national bank stock is assessed on identically the same basis, and all other moneyed capital was forced for the first time under this legislation to make a substantial contribution to the public revenues. A study of the growth and development of state and national banks in Wisconsin for the decade following the enactment of this legislation, 1911 to 1921, shows that this system of taxation did not handicap or retard these institutions.

The following figures taken from the annual report of the Commissioner of Banking for the years 1911 and 1921 show the growth of state and national banks in Wisconsin from Dec. 5, 1911, to Dec. 31, 1921 :

Dec. 5, 1911.

	State Banks (559)	National Banks (129)
Resources	186,003,596	186,653,594
Capital	16,591,650	17,155,000
Surplus	4,774,885	6,982,000

Dec. 31, 1921.

	State Banks (851)	National Banks (152)
Resources	472,909,215	329,014,000
Capital	34,410,100	24,285,000
Surplus	13,061,926	12,766,000

Comment on these figures is unnecessary.

Banking statistics also show that this system of taxation did not prevent national banks in Wisconsin from paying more than average dividends to their stockholders. The Comptroller of the Currency, in his report for 1911, shows that the ratio of dividends to capital in Wisconsin national banks for that year was 11.38, and that the ratio of dividends to capital and surplus was 6.63. His report for 1921 shows the corresponding ratios to be 11.60 and 7.83. This report, page 53-54, also shows:

	% Dividends to capital	% Dividends to capital and surplus
Wisconsin	11.60	7.83
Middle Western States...	11.80	7.30
New England	10.75	5.92
Eastern	14.44	6.73
Southern	11.77	7.15
Western	10.09	6.93
Pacific	11.18	7.36
U. S. (Entire)	12.42	6.88

While counsel for plaintiff in error loosely discuss competition with money invested in the shares of national banks in several places in their brief, they correctly describe the competition which congress had in mind when 5219, U. S. Statutes was enacted. On pp. 45-46 of their brief, with reference to this competition, they say:

“Section 5219 is to be read in the light of the purpose to protect these fiscal agencies of the national government against burdens which would ‘prevent the capital of individuals from freely seeking investment’ therein. or which ‘would diminish their value as an investment and drive capital so invested from this employment.’

Mercantile Bank vs. New York, 121 U. S. 138, 154, 155;

Amoskeag Savings Bank vs. Purdy, 231 U. S. 373, 390.

In other words, national banks are thus protected against competition for capital. In the last analysis, that is the whole purpose, since the ultimate result of competition is the discouragement of the organization or continued existence of national banks. It is undisputed that in this respect state and national banks in Wisconsin face competition for capital in the form of investments exceeding many times their combined capital (R. 48, 49). A man with \$10,000 to invest would have to face in a single year a tax of \$300 if he invested in stock of the plaintiff bank against a tax of \$17 or \$18 if he put the money out at interest with a purpose to keep it so employed. (R. 45, 46.)”

It must be conceded that the above statement indicates a rather deplorable state of affairs so far as investment of money in national bank stock is concerned. However, this argument made by counsel is completely refuted by the rec-

ord, in the case at bar. Under the statutes of Wisconsin national and state banks are authorized to pay the taxes on the shares of stock in such banks. 70.30 Wisconsin Statutes, 1921. Plaintiff bank paid the taxes levied by the state of Wisconsin against its shares of stock. (Findings; Transcript of Record 18-19). After the payment of all taxes, plaintiff bank paid 15% cash dividends on its capital stock in 1921 (Transcript of Record 34). Therefore, the return on \$10,000.00 invested in the shares of plaintiff bank yielded \$1,500.00 net in 1921 and the same amount of money invested in mortgages, according to testimony of plaintiff's president (R. 45), would yield from \$550.00 to \$600.00, and after payment of maximum income tax, the net return would be \$517.00 or \$564.00 respectively.

This conclusively shows that in 1921 the plan of taxation adopted in Wisconsin did not tend to prevent capital from seeking investment in the shares of national banks.

This is why the president of plaintiff bank did not know of any stockholder in the bank who would sell his stock for \$250 per share. (Transcript of Record 41).

In fairness, it must be conceded that plaintiff bank was making a good showing, but the figures above quoted indicate that on the average national banks were doing as well by their stockholders in the state of Wisconsin as these banks were doing by their stockholders in other parts of the country.

Therefore the adoption of the Income Tax Law and the concurrent exemption of money and credits by the state of Wisconsin, did not increase the burden of taxation borne by stock in national banks. This legislation was not hostile to these institutions. They accepted the benefits of this system of taxation for ten years and prospered under it. There is nothing in the record tending to show that this legislation hinders investment of capital in the shares of national banks. Therefore the decision of the supreme court of the state of Wisconsin in this case should be affirmed.

In conclusion we submit that the decision and judgment of the Wisconsin Supreme Court is correct in law and in fact and should be affirmed.

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“APPENDIX A”

(Loans on farm lands—Federal Reserve Act, Sec. 24 amended.) That section twenty-four be, and is hereby, amended to read as follows:

“SEC. 24. Any national banking association not situated in a central reserve city may make loans secured by improved and unencumbered farm land situated within its Federal reserve district or within a radius of one hundred miles of the place in which such bank is located, irrespective of district lines, and may also make loans secured by improved and unencumbered real estate located within one hundred miles of the place in which such bank is located, irrespective of district lines; but no loan made upon the security of such farm land shall be made for a longer time than five years, and no loan made upon the security of such real estate as distinguished from farm land shall be made for a longer time than one year nor shall the amount of any such loan, whether upon such farm land or upon such real estate, exceed fifty per centum of the actual value of the property offered as security. Any such bank may make such loans, whether secured by such farm land or such real estate, in an aggregate sum equal to twenty-five per centum of its capital and surplus or to one-third of its time deposits and such banks may continue hereafter as heretofore to receive time deposits and to pay interest on the same.

“The Federal Reserve Board shall have power from time to time to add to the list of cities in which national banks shall not be permitted to make loans secured upon real estate in the manner described in this section.”

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No 186

FIRST NATIONAL BANK OF HARTFORD,
WISCONSIN,

Plaintiff in Error,

v.

CITY OF HARTFORD AND STATE OF WISCONSIN,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION OF DEFENDANTS IN ERROR FOR REHEARING

The city of Hartford, Wisconsin, and the state of Wisconsin, defendants in error, by J. C. Russell, city attorney of said city of Hartford, Edward J. Dempsey, Franklin E. Bump, assistant attorney general of the state of Wisconsin, and John W. Reynolds, attorney general of the state of Wisconsin, their counsel, respectfully petition the court for a rehearing of the above entitled cause, which was decided on March 21, 1927, on the following grounds:

That, as shown by the Congressional Record and as more particularly pointed out in the petition for a rehearing filed concurrently with this petition in behalf of the state of Minnesota in the case of *State of Minnesota, Petitioner, v. First National Bank of St. Paul*, No. 245, October Term, 1926 (which was argued with this cause and

also decided on March 21, 1927), Congress intended by the enactment of Revised Statutes sec. 5219, and the several amendments thereto, to confine the application of said section to the competitive moneyed capital of state and private banks only.

Without repeating the statement of grounds for rehearing, or the argument made in support thereof in the said petition for a rehearing in the Minnesota case, No. 245, we adopt and make the same a part of this petition by reference.

Respectfully submitted,

J. C. RUSSELL,
City Attorney, City of Hartford,

EDWARD J. DEMPSEY,

FRANKLIN E. BUMP,
*Assistant Attorney General
of State of Wisconsin,*

JOHN W. REYNOLDS,
*Attorney General
of State of Wisconsin,
Counsel for Defendants in Error.*

UNITED STATES OF AMERICA, }
STATE OF WISCONSIN, } ss.
COUNTY OF DANE }

J. C. RUSSELL, EDWARD J. DEMPSEY, FRANKLIN E. BUMP and JOHN W. REYNOLDS, counsel for the defendants in error in the above entitled cause, each for

himself does hereby certify that the above and foregoing petition for rehearing is presented in good faith, and not for delay.

Dated this 28th day of April, 1927.

J. C. RUSSELL,
City Attorney, City of Hartford,

EDWARD J. DEMPSEY,

FRANKLIN E. BUMP,
*Assistant Attorney General
of State of Wisconsin,*

JOHN W. REYNOLDS,
*Attorney General
of State of Wisconsin,
Counsel for Defendants in Error.*

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I think share 3 Nat. Bk. The cases should be noted in the L. Res. because of their local interest

SUPREME COURT OF THE UNITED STATES.

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No. 186.—OCTOBER TERM, 1926.

First National Bank of Hartford, Wis- consin, Plaintiff in Error, <i>vs.</i> City of Hartford and State of Wis- consin.	}	In Error to the Supreme Court of the State of Wisconsin.
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[March 21, 1927.]

Mr. Justice STONE delivered the opinion of the Court.

Plaintiff in error, a national banking association doing business in Wisconsin, brought suit in the circuit court of Washington County, Wisconsin, to recover from the defendant in error, the City of Hartford, a tax assessed and paid for the year 1921 upon shares of stock in plaintiff bank, on the ground that the assessment and tax were prohibited by § 5219 of the Revised Statutes of the United States (Act of June 3, 1864, c. 106, 13 Stat. 99, 112; Act of February 10, 1868, c. 7, 15 Stat. 34). The tax having been paid under protest, a suit for its recovery, raising the legality of the assessment, is permitted by local statutes. Wis. Stat. 1923, § 74.73.

The trial court held the assessment illegal and gave judgment for the plaintiff. On appeal, the Supreme Court of Wisconsin reversed the judgment with a direction to the court below to enter judgment in favor of the defendant, dismissing the complaint. 187 Wis. 290. The case comes here on writ of error under § 237 of the Judicial Code. *Merchants' National Bank v. Richmond*, 256 U. S. 635, 637; *First National Bank v. Anderson*, 269 U. S. 341, 346.

The contention here is that the State Supreme Court erred in holding that these tax statutes are not repugnant to § 5219 Revised Statutes.

"National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its

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fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent." *First National Bank v. Anderson, supra*, 347; *Des Moines Bank v. Fairweather*, 263 U. S. 103, 106. Congress, by appropriate legislation, has permitted the taxation of shares in national banks subject to certain restrictions. Section 5219 sanctions such taxation in the state where the bank is located, subject to the restriction that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." By decisions of this Court construing this language, it is established that the phrase "other moneyed capital" does not embrace all moneyed capital not invested in bank shares, but "only that which is employed in such way as to bring it into substantial competition with the business of national banks". *First National Bank v. Anderson, supra*, 348. Hence the question presented by this record is whether the tax imposed upon the shares of stock of plaintiff under the Wisconsin statutes is at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens of Wisconsin employed in substantial competition with national banks.

By § 70.31 of the Wisconsin statutes, an *ad valorem* tax is assessed upon all shares of banks, including national banking associations, as personal property within the assessment district in which the bank is located. Section 70.11 exempts from such taxation "all moneys or debts due or to become due to any person and all stocks and bonds, including bonds issued by any county, town, city, village, school district, or other political subdivision of this state, not otherwise specially provided for."

Acting under these statutes, the taxing authorities imposed the tax now in question, but made no assessment and levied no tax upon credits or intangible property other than the shares of stock in banking corporations. The State of Wisconsin imposes a tax upon incomes, including incomes derived from credits. The court below assumed, and it was not questioned upon the argument here, that this tax is not to be taken as an equivalent or substitute for the *ad valorem* tax levied upon bank shares and no question of the possible equivalence of the two schemes of taxation is presented. From the sections cited, it appears that the tax statutes of Wisconsin discriminate in favor of moneyed capital and capital invest-

ments within the state, represented by credits or intangibles, and against that invested in shares in banking corporations.

But it is not sufficient to show this discrimination alone. The validity of the tax complained of depends upon whether or not the moneyed capital in the state thus favored is employed in such a manner as to bring it into substantial competition with the business of national banks.

The question thus raised involves considerations both of fact and of law. To answer it, it is necessary to ascertain the nature and extent of the moneyed capital in the hands of individual citizens within the state and the relation of its employment, in point of competition, to the business of plaintiff and other national banks. It is necessary also to ascertain the precise meaning to be given the statute as applied to the facts in hand in order to determine whether the particular moneyed capital and the particular competition with which we are here concerned are moneyed capital and competition within the spirit and purpose of the statute. The question is thus a mixed one of law and fact, and in dealing with it we may review the facts in order correctly to apply the law. *Truax v. Corrigan*, 257 U. S. 312, 325; *Kansas City Southern Ry. v. Albers Commission Co.*, 223 U. S. 573, 591; *Northern Pac. Ry. v. North Dakota*, 236 U. S. 585, 593; *Jones National Bank v. Yates*, 240 U. S. 541, 552, 553; cf. *Merchants' National Bank v. Richmond*, *supra*, 638. The opposite view expressed in *Jenkins v. Neff*, 186 U. S. 230, 235, must be considered discarded by the later cases. Also, as the case is brought here from a state court for review on the ground that a federal right there set up was denied, this Court is not concluded by a finding of the state court that the asserted right is without basis in fact. *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 394; *Southern Pac. Co. v. Schuyler*, 227 U. S. 601, 611.

The evidence shows that plaintiff in the course of its business receives deposits, loans money, has a savings department, deals in exchange, buys and sells notes, government and other bonds, discounts commercial paper and acquires real estate mortgages by loan and purchase. On the trial, plaintiff called numerous witnesses who gave testimony, uncontradicted by defendant, tending to show the nature and extent of various classes of moneyed capital in the hands of individuals in the state and the nature of its employment in competition with the business carried on by national banks. There are real estate firms engaged

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in lending money to individuals in the vicinity of plaintiff's banking house, the amount thus loaned amounting annually from \$250,000 to \$300,000. According to the testimony, the making of these loans affords the same competition to plaintiff as loans made by banks. And similar conditions obtain throughout the state. There are various individuals, co-partnerships and corporations in the vicinity engaged in the business of acquiring and selling notes, bonds, mortgages and securities. Substantial capital is employed in their business. Others, having their place of business in Milwaukee and in Chicago, are engaged within the state in the business of buying and selling securities both in the vicinity of plaintiff's banking house and elsewhere, and employ capital for that purpose. Securities thus acquired and offered for sale include public utility and other forms of bonds, notes and farm mortgages. In 1921, one company alone, having its place of business in Milwaukee but doing business throughout the state, including the vicinity of plaintiff's bank, sold approximately \$25,000,000 of bonds and other securities. This company is shown to be affiliated with and its stock held principally by stockholders of the First Wisconsin National Bank of Milwaukee, and to have been organized for the purpose of taking over the business of the bank in dealing in securities. Neither the capital employed in these various enterprises by individuals or corporations, so far as invested in the credits, nor the shares held by investors in such corporations is subjected to the *ad valorem* tax.

Upon this evidence, the trial court found that during 1921 moneyed capital in the hands of individual citizens in the vicinity of plaintiff's banking house, amounting to many hundreds of thousands of dollars, which was not assessed for taxation nor taxed, was employed in a manner which brought it into competition with the business conducted by national banks, including that of plaintiff. It also found that moneyed capital to the extent of millions of dollars held by individual citizens throughout the state, and employed in a manner which brought it into competition with such banks, was similarly exempt from this taxation.

The State Supreme Court held that it was not concluded by these findings of mixed law and fact. Since the Wisconsin tax law is one of state-wide application, it took judicial notice of the general conditions within the state to which the law applies, and reached the conclusion that there was no capital in the hands of individual

citizens which was invested or used in substantial competition with capital invested in shares of national banks.

In so doing, it pointed out that under § 224.03 (Wis. Stat. 1923) all persons, firms and corporations doing a banking business are required to incorporate as banks and their shares are taxed in the same way and at the same rate as shares in national banks. As the basic ground for its decision, the court stated that in consequence of these statutes, "there are no concerns or individuals within the state of Wisconsin engaged in enterprises in which the capital employed in carrying on its business, is money, 'where the object of the business is the making of profit by its use as money,' except banks. All such persons, firms and corporations are required under the laws of the state of Wisconsin to organize as banks."

But the Wisconsin statutes requiring those engaged in the banking business to incorporate as banks are expressly limited in their application to those engaged in "soliciting, receiving or accepting of money or its equivalent on deposit as a regular business." Wis. Stat. 1923, § 224.02. They have no application to transactions already described which formed the basis of the trial court's finding that competition existed. It is not denied, and indeed it affirmatively appears from the evidence, that there are individuals, firms and corporations in Wisconsin, not required by its laws to be incorporated as banks, engaged in the business of loaning money on the security of notes, bonds, and mortgages, and buying and selling securities, all involving investment and reinvestment by them and their customers. Through the activities of these business concerns, large investments are made and remade in such securities. Large amounts of capital are thus employed in some of the ordinary banking activities although these individuals and firms do not receive deposits.

The state court did not ignore this evidence. It conceded that the local tax statutes were in fact discriminatory. But it apparently construed the decisions of this Court as requiring equality in taxation only of moneyed capital invested in businesses substantially identical with the business carried on by national banks. Consequently, since that class of business must under the Wisconsin statutes be carried on in corporate form and capital invested in it is taxed at the same rate as national bank shares, other moneyed capital, as defined in § 5219, within the state, it thought, was not favored. Under this view, if logically pursued, capital invested in

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businesses engaged in some but not all of the activities of national banks as well as that employed by individuals in investment and reinvestment in securities such as we have described could not be considered in determining the question of competition.

But this Court has recently had occasion, in reviewing the earlier decisions dealing with this subject, to point out that the requirement of approximate equality in taxation is not limited to investment of moneyed capital in shares of state banks or to competing capital employed in private banking. The restriction applies as well where the competition exists only with respect to particular features of the business of national banks or where moneyed capital "is employed, substantially as in the loan and investment features of banking, in making investments by way of loan, discount or otherwise, in notes, bonds or other securities, with a view to sale or repayment and reinvestment." *First National Bank v. Anderson, supra*, 348. In so doing, it followed the holding in *Mercantile Bank v. New York*, 121 U. S. 138, 157, that,

"The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property, . . ."

The amendment to § 5219 (Act of March 4, 1923, c. 267, 42 Stat. 1499), passed after the present tax was levied, provides that "bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments *not made in competition* with such business, shall not be deemed moneyed capital within the meaning of this section." (Italics ours.) It is said that this enactment is a legislative interpretation of § 5219 as it stood prior to the amendment; that consequently a narrower interpretation must be given to this section than in earlier cases, and

that under the section before and as amended, personal investments of individuals should, under no circumstances, be deemed included in the term competing capital. But as was pointed out in *First National Bank v. Anderson, supra*, 350, the amendment did no more than put into express words that "which according to repeated decisions of this Court was implied before." By its terms the amendment excludes from moneyed capital only those personal investments which are not in competition with the business of national banks.

Competition may exist between other moneyed capital and capital invested in national banks, serious in character and therefore well within the purpose of § 5219, even though the competition be with some but not all phases of the business of national banks. Section 5219 is not directed merely at discriminatory taxation which favors a competing banking business. Competition in the sense intended arises not from the character of the business of those who compete but from the manner of the employment of the capital at their command. No decision of this Court appears to have so qualified § 5219 as to permit discrimination in taxation in favor of moneyed capital such as is here contended for. To so restrict the meaning and application of § 5219 would defeat its purpose. It was intended to prevent the fostering of unequal competition with the business of national banks by the aid of discriminatory taxation in favor of capital invested by institutions or individuals engaged either in similar businesses or in particular operations or investments like those of national banks. *Mercantile Bank v. New York, supra*, 155. With the great increase in investments by individuals and the growth of concerns engaged in particular phases of banking shown by the evidence in this case and in *State v. Minnesota v. First National Bank of St. Paul*, today decided, discrimination with respect to capital thus used could readily be carried to a point where the business of national banks would be seriously curtailed. Our conclusion is that § 5219 is violated wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business.

Some of the cases dealing with the technical significance of the term competition in this field were decided before national banks were permitted to invest in mortgages as they now are. Act of

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December 23, 1913, c. 6, § 24, 38 Stat. 251, 273; Act of September 7, 1916, c. 461, 39 Stat. 752, 754; Act of February 25, 1927, § 24. And others go no further than to hold that in the absence of allegation and proof of competition with national banking capital, it cannot be said that an offending discrimination exists. And it is not sufficient to show that untaxed capital is invested in loans and securities without showing also that the class of investments favored is open to national banks.

Here, large amounts of capital are shown to be invested in businesses carried on throughout the state which are of the same character as some though not all of the business carried on by national banks. In two fields at least, loans and sales of credits, capital thus employed is shown to be in substantial competition with that of national banks.

The evidence might have been directed more in detail to the precise character of the competition. But that offered was uncontradicted, and when it was shown that national banks in the State of Wisconsin having a capital and surplus in excess of fifty millions of dollars are engaged in the business of making loans, and that there is an extensive loan business in the state not subjected to the tax burdens of national banks, and it was testified directly that this business came into competition with the business of plaintiff and other national banks, we think that the finding of the trial court was supported by the evidence and should not have been disturbed.

There was also, we think, sufficient evidence that private individuals as investors of surplus funds are engaged in loaning money at interest on real estate mortgages and other evidences of indebtedness such as normally enter into the business of banking and that these investments are of substantial amount. We do not conceive that in order to establish the fact of competition it is necessary to show that national banks and competing investors solicit the same customers for the same loans or investments. It is enough as stated if both engage in seeking and securing in the same locality capital investments of the class now under consideration which are substantial in amount.

It is argued that national banks are not authorized to deal in bonds or other evidences of indebtedness and that § 5219 was not intended to protect them from discriminatory taxation in favor of moneyed capital employed in a business in which they may not engage. But it is not necessary for the purposes of this case to

determine the precise limits of their powers. They are given authority, in addition to loaning money, to exercise all such "incidental powers" as shall be necessary to carry on the business of banking "by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt." § 5136 Revised Statutes. They are authorized, with certain limitations, to loan money on real estate mortgages. Act of December 23, 1913, *supra*; Act of September 7, 1916, *supra*; Act of February 25, 1927, § 24. Here plaintiff is shown to have investments in real estate mortgages and to be engaged in selling them. The sale of mortgages and "other evidences of debt" acquired by way of loan or discount with a view to reinvestment is, we think, within the recognized limits of the incidental powers of national banks. Compare *First National Bank v. Anderson*, *supra*, 348; *Mercantile National Bank v. New York*, *supra*, 156. To that extent the business of acquiring and selling such mortgages and evidences of debt, carried on by numerous individuals, firms, and corporations in Wisconsin, comes into competition with this incidental business of national banks. That the exercise of this incidental power has become of great importance in the business of national banks appears from the Report of the Comptroller of the Currency for 1924, 44 *et seq.*, showing that approximately one-third of the investment of national banks consist of Government, railroad, public service corporation and other bonds, and "collateral trust and other corporation notes."

Finally it is said that § 5219 is directed to an unfriendly discrimination or hostile attitude on the part of a state and that here the Wisconsin legislation was not dictated by such considerations, since the challenged exemptions were merely incidental to the adoption of a state policy of substituting, so far as possible, an income for a personal property tax. But a consideration of the entire course of judicial decision on this subject can leave no doubt that state legislation and taxing measures which by their necessary operation and effect discriminate against capital invested in national bank shares in the manner described are intended to be forbidden. The questions here considered arising from the application of an *ad valorem* tax are not affected by the amendment of § 5219 by the Act of March 4, 1923, c. 267, 42 Stat. 1499, which permits in lieu of the *ad valorem* tax on shares of national banks either a non-discriminatory tax on the income of national banks or on the income derived from their shares.

Judgment reversed.

